No. 88-1476-CFX
Status: GRANTED

Title: C. T. Carden, et al., Petitioners
v.
Arkoma Associates

Docketed:
March 9, 1989

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Ingolia,Richard K.

Counsel for respondent: Hoffman,Mitchell J.

Entry	Date	Note	Proceedings and Orders
1	Mar 9 1989	G	Petition for writ of certiorari filed.
2	Apr 8 1989		Brief of respondent Arkoma Associates in opposition filed.
4	Apr 12 1989		DISTRIBUTED. April 28, 1989
3	Apr 19 1989	X	Reply brief of petitioners C. T. Carden, et al. filed.
5	May 1 1989		Petition GRANTED.
			**********
6	Jun 6 1989		Joint appendix filed.
7	Jun 6 1989		Brief of petitioners C. T. Carden, et al. filed.
9	Jun 27 1989		Order extending time to file brief of respondent on the merits until July 29, 1989.
10	Jul 28 1989		Brief of respondent Arkoma Associates filed.
11	Aug 21 1989		Reply brief of petitioners C. T. Carden, et al. filed.
12	Aug 24 1989		CIRCULATED.
14	Aug 28 1989		SET FOR ARGUMENT TUESDAY, NOVEMBER 7, 1989. (3RD CASE)
13	Aug 29 1989		Record filed.
		*	Certified copy of original record and proceedings, 8 volumes, and exhibits, 2 boxes, received.
15	Nov 7 1989		ARGUED.

(1)

NO. 88-1476

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,
Petitioners

VERSUS

ARKOMA ASSOCIATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. T. Carden, et al.*, ____ F. 2d ____ (5th Cir. 1988), rehearing denied, January 5, 1989; is in conflict with this Court's decision in *Navarro Savings Association v. Lee, et al.*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980).

2. Whether the citizenship of the limited partners of a purported Arizona limited partnership named plaintiff in a civil case is relevant to a determination of diversity jurisdiction.

3. Whether diversity jurisdiction exists in a civil case in which the citizenship of a limited partner of plaintiff limited partnership is the same as that of the defendants.

STATEMENT OF PARTIES

Pursuant to Rule 21.1 (b) and Rule 28.1 counsel for petitioners certify that the following named persons are parties to this proceeding:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Robert Eltonhead;
(20) Dennis Swan;
(21) Dick Gibson;
(22) Dr. John Hagan;
(23) Leo Hallack;
(24) Robert E. Harmon;
(25) Richard L. Harmon;
(26) Earl Hoatson;
(27) Andrew Kaufman;
(28) Dr. Allen Parelman;
(29) Bill Kryger;
(30) L V A Partnership
(31) Dr. Richard Lynch;
(32) Mc Fadin Partnership;
(33) John Mc Keever;
(34) Percy Mc Kinley;
(35) Nat N. Nast;
(36) Dr. John Pawsat;
(37) Henry Rankin;
(38) David Russell;
(39) Robert Samson;
(40) Dr. Daniel Scharf;
(41) Robert Schneider;
(42) Larry Shultz;
(43) Keith Shultz;
(44) Elton Shannon;
(45) Ernest Staub;
(46) Frances Swan;
(47) John Sullivan;
(48) Jon Symon;
(49) David Wharton;
(50) Dale Williams;
(51) Dr. Robert Doering; and
(52) Jim Veselich.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,
Petitioners

v.

ARKOMA ASSOCIATES, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Petitioners, C. T. Carden, Leonard L. Limes, and Magee Drilling Company, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in *Arkoma Associates v. C. T. Carden, et al.* nos. 87-3624; 87-3917, not reported (5th Cir. 1988).

The decision is set forth in the Appendices.

GROUNDS FOR JURISDICTION

The opinion of the Fifth Circuit Court of Appeals in this case was rendered on December 7, 1988, and rehearing was denied January 5, 1989. This petition for a writ of certiorari was filed within ninety days of the denial rehearing.

Jurisdiction of the Court is predicated on Title 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States:

United States Constitution, Article III Section 2, states:

" The judicial Power shall extend to all Cases, in Law and Equity, . . . between citizens of different States. . ."

28 U.S.C. 1332 (a), states:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of costs, and is between —

(1) citizens of different States; . . . "

STATEMENT OF THE CASE

Respondent, Arkoma Associates, a purported Arizona limited partnership, filed this action against Petitioners, C. T. Carden and Leonard L. Limes, as the quarantors of an equipment lease entered into among the various individuals comprising and in the name of Respondent, Arkoma Associates, as lessor, and Petitioner, Magee Drilling

Company, as lessee. Petitioners, C. T. Carden and Leonard L. Limes, are citizens of Louisiana; petitioner Magee Drilling Company is a citizen of Texas. One of Respondent's purported limited partners is a citizen of Louisiana. Because of the identity of citizenship among Petitioners and Respondent's Louisiana purported limited partner, Petitioners moved to dismiss this action for lack of diversity jurisdiction. The Trial Court denied the motion to dismiss but certified the question of diversity jurisdiction to the Fifth Circuit Court of Appeals pursuant to 28 U. S. C. 1292 (b). Petitioners filed a petition for interlocutory appeal which was denied by the Fifth Circuit Court of Appeals on the basis of its decision in the case of *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986). Petitioners filed an application for certiorari in this Court seeking review of the Fifth Circuit's denial of their petition for interlocutory appeal. This Court refused the application for certiorari.

This action was then tried on the merits resulting in a judgment in favor of Respondent. The District Court was affirmed on appeal, rehearing was denied, and this application for certiorari was filed in this Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action conflicts with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

2. There is a conflict in the decisions of the Fifth Circuit Court of Appeals on the one hand, and those of the Third, Fourth, and Seventh Circuit Courts of Appeals on the other, relative to the determination of diversity jurisdiction in cases in which a limited partnership is a party. *Lee v. Navarro Savings Association*, 597 F. 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986); and

the instant decision hold that diversity jurisdiction exists in cases in which a limited partnership is a party and is composed of limited partners some of whom posses citizenship which is the same as that of an adverse party.

Carlsberg resources Corporation v. Cambria Savings & Loan Association, 554 F. 2d. 1254 (3rd Cir. 1977); *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); and *Elston Investment Ltd. v. David Altman Leasing Corporation*, 731 F.2d 436 (7th Cir. 1984) all hold that diversity jurisdiction does not exist in a case in which one of the parties is a limited partnership composed of limited partners whose citizenship is the same as that of an adverse party.

ARGUMENT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *NAVARRO SAVINGS ASSOCIATION V. LEE*, 446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

The Fifth Circuit sustained diversity jurisdiction in this case because it considered the citizenship of Arkoma Associates' general partners only in determining the presence or absence of diversity jurisdiction. Had it taken into account the citizenship of Arkoma's limited partners, there would have been no jurisdiction in that one of Arkoma's limited partners is stipulated to be citizen of Louisiana as are Petitioners Carden and Limes.

The issue before the Fifth Circuit Court of Appeals in the instant case is the same as that considered by this Court in *Navarro Savings Association v. Lee*, supra. Although this Court affirmed the result reached by the Fifth Circuit therein, it did so by rejecting the logic relied on by the Fifth

Circuit in this case. The organization at issue in *Navarro*, supra, was a Massachusetts business trust, the trustees of which held legal title to the trust assets while the beneficiaries possessed equitable title. The interest of the beneficiaries was represented by trust certificates transferable as stock in a corporation is transferable. Therefore, the beneficiaries were not at all times the same. The Fifth Circuit sustained diversity jurisdiction in *Navarro* by analogizing the trust to a limited partnership and relying on *Colonial Realty Corporation v. Bache & Company*, 358 F. 2d 178 (2d Cir. 1966) which held that in a diversity case involving a limited partnership the citizenship of the general partners alone need be considered. In *Navarro* this Court granted certiorari, affirmed the result reached by the Fifth Circuit, but repudiated its reasoning, holding:

> "Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, unicorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. Ed. 842 (1900) (limited partnership association); see *Steelworkers v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (1965) (labor union); *Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800 (1889) (joint stock company) . . .
>
> But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction . . .

> Federal Rule of Civil Procedure 17 (a) now provides that such trustees are real parties in interest for procedural purposes."

Petitioners submit, as the Third and Seventh Circuits have held, infra, that this Court rejects the principle that only the citizenship of the general partners of a limited partnership determines the presence or absence of diversity jurisdiction. *Navarro's* result was sustained because the organization therein involved was *not* a limited partnership but a business trust.

Federal Rules of Civil Procedure, Rule 17 (a), cited by this Court in *Navarro*, in pertinent part provides:

> "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is brought . . ."

It is noteworthy that neither the general partner of a limited partnership nor any partner is mentioned by *Rule 17 (a)* as a real party in interest. Additionally, there is no division between legal and equitable ownership in a limited partnership as there is in a trust. The four general partners of Respondent own one per cent of the partnership while the forty-eight limited partners own ninety-nine per cent.

This Court's holding in *Navarro*, supra, mandates the presence of "the *real* parties to this controversy" for purposes of determining diversity. How can it be said that such a limited partner's citizenship should not be considered, or that a general partner is a real party in interest and a limited partner is not?

2. THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS ON THE ONE HAND AND THOSE OF THE THIRD, FOURTH, AND SEVENTH CIRCUIT COURTS OF APPEALS ON THE OTHER, CONFLICT ON DETERMINATION OF DIVERSITY JURISDICTION IN CASES INVOLVING LIMITED PARTNERSHIPS.

The Fifth Circuit in *Lee, et al. v. Navarro Savings Association,* 597 F. 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Intra State Gas Corporation,* 797 F. 2d 238 (5th Cir. 1986); and in the instant case has held that only the citizenship of the general partners of a limited partnership need be considered in determining diversity jurisdiction in cases involving limited partnerships.

The Fifth Circuit relying on *Navarro* in *Mesa* held:

> "Since we find it unnecessary to consider the citizenship of limited partners, we conclude that it need not be ascertained.
>
> We apply the Supreme Court's analysis in *Navarro Savings Ass'n v. Lee,* 446 U. S. 458 (1980), affirming a decision of this court, to this case . . .
>
> We find this reasoning equally appropriate here. A limited partnership is also neither corporation nor association but a similar hybrid. Here, as in *Navarro*, the power to control and manage assets and litigation rests exclusively with one class of members, the general partners. We think that where it is possible to identify clearly a class of members as the real party to the controversy, the citizenship of that class alone is relevant for diversity purposes."

To the contrary, the Third Circuit in *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); and the Seventh Circuit in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984) have held that the citizenship of both the general and limited partners must be considered in determining diversity jurisdiction.

The Third Circuit in *Trent* held:

> "An analysis of the diversity issue must begin with the undisputed proposition that a limited partnership is an unincorporated association whose citizenship is deemed to be that of the 'persons composing such association'. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S.449, 456, 20 S. Ct. 690, 698, 44 L. Ed. 842 (1900). Applying that holding to the precise issue raised here, this court held that the citizenship of a limited partner will defeat diversity if it is the same as one of the parties on the opposing side. *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F. 2d 1254 (3rd Cir. 1977).
>
> First Federal urges us to abandon the holding of *Carlsberg Resources* on the ground that the subsequent decision of the Supreme Court in *Navarro Savings Ass'n v. Lee*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980), requires that we apply a 'real party in interest' test in determining Trent's citizenship. It argues that under the analysis in *Navarro*, only the general partners are such parties here. We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources*.

> The Court cited limited partnerships as one of the class of unincorporated associations which are to be distinguished from express trusts, and referred approvingly to the holding of *Great Southern Fire Proof Hotel Co. v. Jones*, supra, as governing limited partnerships.
>
> We see nothing in the Court's opinion to support First Federal's position that the *Navarro* holding compels application of 'a real party in interest' test to limited partnerships."

The Fourth Circuit in *New York Teachers* finding that diversity jurisdiction did not exist held:

> "Teachers is a public retirement system created and existing by virtue of Article 11 of the Education Law of the State of New York and having the powers and privileges of a corporation pursuant to Section 502 of that statute. Teachers' principal place of business is in Albany, New York . . .
>
> Except for PTA, all of the defendants/appellants are citizens of states other than New York. PTA is a limited partnership established under the laws of Virginia. Its sole general partner is Kalkus, a resident and citizen of the State of New Jersey. Several dozen limited partners are residents of numerous states, including New York . . .
>
> The district court concluded that it had jurisdiction over the action pursuant to 28 U. S. C. 1332 (a). It ruled that the citizenship of a limited partnership is determined by the citizenship of all of its general partners, without regard to the citizenship of any limited partners, and that, therefore, all of the defendants, for jurisdictional purposes, were citizens of states other than New

York.

Defendants appeal.

On appeal, the primary contention made by defendants/appellants is that the district court lacked subject matter jurisdiction over this action. They maintain that all of the partners of PTA, both general and limited, must be considered in determining whether complete diversity exists. We agree and consequently, do not reach the other contentions raised by appellants."

The Seventh Circuit in *Elston*, finding that diversity jurisdiction did not exist, held:

"The Supreme Court has directed federal courts when determining whether complete diversity of citizenship exists, to disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy. *Navarro Savings Ass'n v. Lee* . . .

When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court . . .

ThermaSol bases its argument for an exception to the rule on an analogy between a limited partnership and an express business trust. TheremaSol points out that general partners, like a trustee, manage the assets of a limited partnership and control litigation involving the partnership . . .

In *Navarro*, the Supreme Court rejected the very analogy upon which ThermaSol now relies . . .

In addition, we reject the argument that limited

partners are not 'real parties' to controversies involving the partnership because they have no capacity to sue on behalf of the partnership."

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this case conflicts with that of this Court in *Navarro Savings Association v. Lee*, supra.

The decisions of the Fifth Circuit Court of Appeals conflict with those of the Third, Fourth, and Seventh Circuit Courts of Appeals with respect to the necessity for considering the citizenship of limited partners when determining the existence of diversity jurisdiction.

Petitioners pray that a *writ of certiorari* be issued by this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record by depositing the same in the U. S. Mail, postage preapaid this 8th day of ~~February~~ March 1989.

I further certify that all parties required to be served have been served.

Richard K. Ingolia

Richard K. Ingolia

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3624

ARKOMA ASSOCIATES,
Plaintiff-Counter Defendant-Appellee,

versus

C. TOM CARDEN and
LEONARD L. LIMES,
Defendants-Appellants,

MAGEE DRILLING COMPANY, INC.,
Intervenor-Counter Plaintiff-Appellant,

versus

DAVID HEPBURN, ET AL.,
Third Party Defendants-Appellees.

No. 87-3917

ARKOMA ASSOCIATES,
Plaintiff Appellee Cross-Appellant,

versus

C. TOM CARDEN and
LEONARD L. LIMES,
Defendants-Appellants Cross-Appellee

and

MAGEE DRILLING COMPANY,
Intervenor-Appellant Cross-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-85-2295-D (4))

(December 7, 1988)

Before POLITZ, and JOHNSON, Circuit Judges, and Boyle,* District Judge.

POLITZ, Circuit Judge:**

In these consolidated appeals Magee Drilling Company (MDC), C. Tom Carden, and Leonard L. Limes challenge the judgments in favor of Arkoma Associates, a partnership, rendered July 27, 1987 and September 17, 1987. Finding no reversible error, we affirm.

Background

This litigation arises out of Arkoma's lease of two drilling rigs to MDC, a Texas corporation. MDC maintains that it was interested in buying or leasing two rigs capable of drilling to 7,500 feet. Discussions ensued between representatives of Arkoma and MDC. Arkoma avers that it made no representations as to drilling capacity and it gave MDC ample opportunity to inspect the rigs. MDC contends that Arkoma represented that the rigs were capable of drilling to 7,500 feet and that the principal

* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

rig components consisted of new or rebuilt parts.

On June 27, 1984 the parties executed a lease agreement which expressly declared that no warranties were given. Don Magee, president of MDC and an experienced oil and gas operative, signed the lease and initialed each page on an attached rig inventory list. Carden and Limes, also experienced oil men, joined Magee in personally guaranteeing the drilling company's obligations under the lease.

MDC employees inspected the rig equipment and supervised its transportation from Oklahoma to Texas. Upon arrival, damaged and missing parts and the wrong drill pipe were discovered, and the parties amended the lease to give MDC a credit of $45,000 and other concessions.

MDC used the rigs for over five months and drilled 19 wells. MDC contends that the rigs were defective and incapable of drilling to 7,500 feet, and that Arkoma knew of these defects. Arkoma counters that there is no evidence that the rigs could not drill to 7,500 feet because of defective equipment, that no unusual problems were encounted, and that MDC made no complaints until December 1984 when it tried to repudiate the lease.

On December 28, 1984 MDC notified Arkoma that it could no longer honor its obligations to its creditors. An attempt at compromise was unsuccessful and the following month MDC tendered the rigs to Arkoma. Arkoma accepted physical possession to protect its rigs from damage; however, it reserved its rights under the lease. MDC failed to make the February 1985 payment and Arkoma gave notice of default and accelerated the lease payments. Suit

was then filed against Carden and Limes as MDC's guarantors.[1]

Carden and Limes, both Louisiana citizens, moved to dismiss for lack of diversity jurisdiction, contending that one of the partners of Arkoma was also a Louisiana citizen. The district court denied that motion but certified the jurisdictional question. We declined to accept the interlocutory appeal. Carden and Limes counterclaimed and MDC intervened, claiming violations of the Texas Deceptive Trade Practices Act.

Following a bench trial the court awarded Arkoma judgment in the amount of $467,806.25 plus interest and attorney's fees. The counterclaim and intervention were rejected. Carden, Limes, and MDC appeal.

Analysis

1. Jurisdiction

The threshold issue raised on appeal is whether Arkoma properly invoked diversity jurisdiction. As found by the trial court and uncontested on appeal, two of Arkoma's general partners are citizens of Arizona and the other two are citizens of Oklahoma. One partner -- claimed by Arkoma to be a limited partner -- is a citizen of Louisiana, as are Carden and Limes.

The citizenship of a general partnership is determined by the citizenship of all the partners. If Arkoma is a general partnership, complete diversity of citizenship between the parties-plaintiff and parties-defendant does not exist. On the other hand, if Arkoma is a limited

[1] It is not clear from the record why Don Magee was not included as a party-defendant.

partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. *See Navarro Savings Association v. Lee*, 446 U.S. 458 (1980); *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Crop.*, 797 F.2d 238 (5th Cir. 1986).

The district court found that Arkoma, organized under the laws of Arizona, was a limited partnership under the laws of that state. The district court noted that while Arkoma did not comply with all of the requirements of Arizona Revised Statutes Section 29-302,[2] it had, "in good

[2] Section 29-302 of the Arizona Revised Statutes provides, in pertinent part:

> A. Two or more persons desiring to form a limited partnership shall:
>
> 1. Sign and acknowledge a certificate, which shall state:
>
> (a) The name of partnership.
>
> (b) The character of the business.
>
> (c) The location of the principal place of business.
>
> (d) The name and place of residence of each member; general and limited partners being respectively designated.
>
> (e) The term for which the partnership is to exist.
>
> (f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.
>
> . . .
>
> (i) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.
>
> [Subsection (j), (k), (l), (m), and (n) relate to various rights of limited partners.]

faith, substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law."

Appellants maintain that the district court erred in finding that Arkoma was a limited partnership because of its "substantial compliance" with Arizona law. The record reflects that Arkoma's certificate of partnership was filed with the recorder's office in Maricopa County, Arizona on September 1, 1981. An amended limited partnership agreement was filed with the office of the Arizona Secretary of State on September 10, 1982. A second certificate of amendment was filed after the instant suit was initiated. The limited partnership agreement describes the name, place of business and purpose of the partnership, the names of the four general partners, the capital contribution of the general and limited partners, the division of profits and losses between the general and limited partners, and the rights of the limited partners. The names and addresses of the limited partners were not listed.

To the extent that the district court's finding of substantial compliance is a finding of fact, it is not clearly erroneous; to the extent it is a conslusion of law it is not in error. Thus, the juristictional challenge falters. Our recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.* is dispositive. It rejects the arguments advanced by appellants. We find the requisite federal jurisdiction.

---

footnote 2 continued)

2. File for record the certificate in the office of the county recorder of the county in which the principal place of business is situated.

Effective July 24, 1982, section 29-302 was reenacted as section 29-308. A significant change required the filing of certificates of partnership with the Arizona Secretary of State.

2. Viability of lease and guaranty agreements

MDC, Carden, and Limes vigorously contend that the lease and guaranty agreements were vitiated by Arkoma's fraud and nondisclosures. This challenge founders on the shoals of Fed.R.Civ.P. 52(a), which directs that findings of fact by the trial court are to be accepted unless shown to be clearly erroneous.

The trial court found: that Arkoma made "no material representations or omissions as to the quality, capacity or performance of the land drilling rigs"; that Magee and another MDC representative, Joe Claus, had an opportunity to inspect the rigs before the lease was signed; that Claus thoroughly inventoried the rigs prior to the signing; that MDC transported the rigs from Oklahoma to Texas; that after their arrival in Texas, the rigs were inspected and the parties settled a dispute over inappropriate pipe and missing and damaged components by giving MDC a substantial credit; and that 19 wells were drilled in the five months after delivery without any complaint from any MDC representative of Cardin, Limes, or Magee. It is too firmly established to require citation that a finding of fact may not be characterized as clearly erroneous unless the reviewing court has a definite and firm conviction that an error has been committed. Reviewing the trial court's finding in light of the evidence presented, and giving due weight to credibility assessments, we come to no such firm conviction.

3. Surrender of the rigs

MDC, Carden, and Limes argue that Arkoma voluntarily terminated the lease when it accepted physical possession of the rigs in January, contending that Arkoma cannot both take possession of the property and enforce an

Appeals from the United States District Court
for the Eastern District of Louisiana

ON SUGGESSTION FOR REHEARING EN BANC

(Opinion 12/07/88, 5 Cir., 198__, _____F.2d._____)

Before POLITZ, and JOHNSON, Circuit Judges, and BOYLE,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Henry A. Politz
United States Circuit Judge

* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL
	*	ACTION
versus	*	No. 85-2295
	*	
C. TOM CARDEN AND	*	SECTION "D"
LEONARD L. LIMES	*	
	*	Mag. Div. 4
	*	

* *

STIPULATION

IT IS HEREBY agreed and stipulated by an among Arkoma Associates, plaintiff, C. T. Carden and Leonard L. Limes, Defendants, each through undersigned counsel:

1) Arkoma Associates is alleged to be a limited partnership under the law of the State of Arizona.

2) One of the alleged limited partners is a citizen of Louisiana for the purposes of jurisdiction based on diversity of citizenship.

3) The alleged general partners of Arkoma associates and the states of their citizenship are a follows:

David Hepburn	-	Arizona
Dudley Merkel	-	Arizona
Richard Ledbetter	-	Oklahoma
Eldon Qualls	-	Oklahoma

4) This stipulation is in lieu of a formal amendment to the complaint insofar as it identifies the names and domiciles of the general partners.

Respectfully Submitted:

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

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Leonard L. Limes and Magee
Drilling Company

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEP 17, 1987

ARKOMA ASSOCIATES	*	CIVIL ACTION
versus	*	No. 85-2295
C. TOM CARDEN, ET AL	*	SECTION "D" (4)

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law dated July 29, 1987;

JUDGMENT IS HEREBY RENDERED:

1. In favor of Plaintiff, Arkoma Associates, and against Defendants, C. Tom Carden and Leonard L. Limes, in the amount of $467,806.25 plus all additional attorney's fees incurred by Arkoma Associates after April 30, 1987 relating to services performed in connection with pre-trial

DATE OF Entry OCT 23, 1987

preparation, trial work, post-trial and all appeals, plus interest on such sum at the legal rate from February 18, 1985 (date of notice of default) until paid.

2. In favor of Arkoma Associates, Davis A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel dismissing the Counterclaim filed by C. Tom Carden and Leonard L. Limes, with prejudice, at their costs.

3. In favor of Arkoma Associates, Davis A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel dismissing the Interventiona nd ncounterclaim filed by Intervenor, Magee Drilling Company, with prejudice, at its costs.

New Orleans, Louisiana, this 17 day of September, 1987.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED JUNE 29, 1987

ARKOMA ASSOCIATES	*	CIVIL
	*	ACTION
versus	*	No. 85-2295
	*	
C. TOM CARDEN, ET AL	*	SECTION "D" (4)

This matter came on for trial on a former day on the Complaint and Counterclaim and with Magee Drilling Company as an intervenor. After considering the testimony, documentary evidence, argument of counsel and memoranda, the court enters the following Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52. To the extent any of the Findings of Fact are later held to be more accurately described as Conclusions of Law, they should be treated as such and likewise to the extent that any of the Conclusions of Law are later held to be more accurately described as Findings of Fact, they should be so treated. The court makes these Findings of Fact after observing the demeanor of the witnesses and some of the findings are a result of credibility calls.

DATE OF ENTRY JUL 29 1987

FINDINGS OF FACT

1.

Plaintiff, Arkoma Associates, is a limited partnership dully organized and existing under the laws of Arizona. (Exhibit D-5a).

2.

The Defendants are C. Tom Carden, an individual of the full age of majority and a resident of the Parish of Orleans, State of Louisiana, and Leonard L. Limes, an individual of the full age of majority and a resident of the Parish of Jefferson, State of Louisiana. (Stipulation)

3.

Intervenor, Magee Drilling Company ("MDC") is incorporated under the laws of the State of Texas. (Stipulation)

4.

Counter-claim defendants, David A. Hepburn and Dudley B. Merkel, both citizens of the State of Arizona and Eldon E. Qualls and Richard K. Ledbetter, both citizens of the State of Oklahoma, are the general partners of Arkoma. (Stipulation).

5.

One limited partner of Arkoma is a citizen of Louisiana (stipulation).

6.

Don Magee, former President of MDC is a citizen of the State of Texas.

7.

Magee, Limes and Carden are all experienced in the oil and gas business.

8.

Arkoma Associates purchased two land drilling rigs in late 1981.

9.

On or about June 27, 1984, Arkoma Associates and MDC executed an equipment lease whereby Arkoma Associates leased the two drilling rigs to MDC. (P-3).

10.

Carden, Limes and Magee executed a guarantee agreement on June 27, 1984, guaranteeing performance of all of MDC's obligations under the lease agreement. (P-4).

11.

Prior to executing said lease agreement, MDC through Magee and another representative, Joe Claus, had ample opportunity to inspect the two land drilling rigs.

12.

No material representations or omissions as to the

quality, capacity or performance of the land drilling rigs were made by any representative of Arkoma to MDC, Magee, Limes or Carden prior to confection of the lease agreement between MDC and Arkoma.

13.

MDC, through its representative Mr. Claus, completely inventoried both land drilling rigs prior to signing the lease agreement between Arkoma and MDC.

14.

MDC supervised transportation of the rigs from their locations in Oklahoma to MDC's principal place of business in Alice, Texas. (P-3).

15.

MDC, pursuant to the lease agreement, paid all transportation costs for transporting the drilling rigs to Alice, Texas. (P-3).

16.

Upon arrival of the rigs in Alice, Texas, MDC inspected the drill pipe as provided in the lease and found it was not acceptabale. Various items of equipment, tools and supplies which were missing at the inventory were still missing and certain other component parts and equipment were damaged.

17.

On July 18, 1984, Arkoma and MDC executed an

amendment to the lease which was intended to settle all claims by MDC for drill pipe, as well as missing and damaged supplies and equipment. (P-5)

18.

MDC drilled approximately 19 wells with the Arkoma rigs. (P-22)

19.

Between July 18, 1984, the date of the amendment to the lease and December 28, 1984, neither MDC, Limes, Carden or Magee wrote to Arkoma to complain of any problem with the quality, performance or capacity of the rigs. (Tr. 121)

20.

On December 28, 1984, MDC notified Arkoma in writing that it was no longer able to honor its obligations to creditors, including the February 1, 1985 rental payment to Arkoma.

21.

MDC requested a meeting with the Arkoma representatives to discuss "a compromise on cancellation or extension of the lease;" and put Arkoma on "formal notice" that in the event no compromise at the proposed meeting is reached, the two rigs will be tendered to Arkoma in Alice, Texas sometime in January. (See Trial Exhibit D-1)

22.

Representatives of Arkoma and MDC met in Dallas, Texas on January 16, 1985 to discuss a renegotiation of the lease for the rigs.

23.

At the meeting in Dallas, Texas, no agreement concerning the lease was reached. MDC repudiated its obligations under the lease and tendered the rigs back to Arkoma Associates.

24.

Although the Defendants allege that the meeting in Dallas, Texas in January of 1985 was held purportedly to discuss alleged defects in the equipment, the real purpose of the meeting was to discuss the inability of MDC to live up to its contractual obligations under the lease agreement and to tender the rigs back to Arkoma.

25.

MDC's failure to timely make lease payments was not caused by any defect in the equipment; but, on the contrary, by a general economic down-turn in the oil drilling industry and by an overly optimistic forecast of expected drilling activities by MDC.

26.

Arkoma Associates acted reasonably when it took the rigs into physical possession to protect the rigs from damage or loss after they were tendered and did not thereby terminate its lease agreement with MDC or in

anyway waive its rights to payment under the lease (P-20).

27.

Arkoma associates did not then nor has it ever released MDC, Limes, Carden or Magee from any of its or their obligations under the lease agreement and/or guarantee (P-20).

28.

MDC failed to pay the February 1, 1985 rental payment.

29.

MDC, Carden, Limes and Magee were put on notice of MDC's default of the lease for non-payment of rent for the quarter commencing February 1, 1985 by letter dated February 18, 1985. Said notice of default declared, inter alia, the entire amount of rent due under the lease immediately due and payable.

30.

Neither MDC, Magee, Limes or Carden cured said default.

31.

Paragraph 24 of the lease agreement provides for a method of "cancellation" of the lease, but by its terms is inapplicable because the default and tender of the rig occurred prior to the twelfth month of the lease.

32.

As a result of the breach of the lease, MDC, Carden and Limes are indebted to Arkoma in the amount of FOUR HUNDRED SIXTY SEVEN THOUSAND EIGHT HUNDRED AND SIX AND 25/100 ($467,806.25) DOLLARS, plus any outstanding attorneys fees incurred by Arkoma. The award of $467,806.25 is broken down as follows:

Remaining payments for first year (last two quarters of first year) which were not paid - $36,000 per quarter	+	$ 72,000.00
Second and third year payments - eight quarters at $ 45,000 per quarter	+	360,000.00
Storage fees, incidental costs, attorney's fees submitted	+	80,806.25
Less $45,000 credit for last quarter rental payment provided for in escrow as set out in amendment to lease (P-5)	-	45,000.00
TOTAL		$ 467,806.25

33.

MDC, Limes, Carden and Magee failed to prove that the rigs in question were not reasonably fit for the purpose intended or that the rigs exhibited inordinate repair, maintenance or downtime.

CONCLUSIONS OF LAW

1.

This court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. 1331.

2.

The citizenship of a limited partnership shall be judged by the citizenship of its general partners. *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F.2d 238 (5th Cir. 1986); *Navarro Savings Association v. Lee*, 466 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).

3.

The equipment lease agreement provided that Texas law would apply and accordingly Texas law is applicable.

4.

Neither MDC, Limes, Carden or Magee have been released from any of its or their obligations under the lease agreement or guarantee agreement. (Paragraph 17, 24 of lease)

5.

Defendants, Limes and Carden, are liable to Arkoma for all obligations of MDC under the lease agreement as well as reasonable attorney's fees and incidental expenses provided in said lease in bringing this action. (Paragraphs 24, 17, 18, 4 of lease; Paragraph 1 of guaranty)

6.

Texas law does not preclude recovery of accelerated rental in breach of lease cases of this nature. *Robinson v. Granite Equipment Leasing Corp.*, 553 S.W.2d 633 (Tex. Civ. App. 1977), *writ ref. n.r.e.; Blakeway v. General Electric Credit Corp.*, 429 S.W.2d 925 (Tex.Civ.App. 1968), *writ ref. n.r.e.*

7.

Neither Arkoma nor its general partners violated any of the provisions of the Texas Deceptive Trade Practices Act and the equipment in question was not misrepresented to MDC, Carden or Limes.

8.

The rigs in question were reasonable suited for the purposes intended.

9.

Plaintiff, Arkoma Associates, is entitled to judgment againsst Defendants, C. Tom Carden and Leonard L. Limes, in the amount of $467,806.25 with interest from February 18, 1985 (date of notice of default) until paid.

10.

The Counterclaim filed by C. Tom Carden and Leonard L. Limes against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel should be dismissed.

11.

The Intervention and Counterclaim filed by In-

tervenor, Magee Drilling Company, against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel should be dismissed.

New Orleans, Louisiana, this 29 day of July, 1987.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX D

Application No. A-642

The application for stay of mandate of the United States Court of Appeals for the Fifth Circuit presented to Justice White and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. This order is conditioned upon the posting of a good and sufficient security with the Clerk of The United States District Court for the Eastern District of Louisiana, the adequacy of such security to be determined by a judge of that court.

FILED
APR 8, 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1476

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,
Petitioners,

V.

ARKOMA ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,
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V.

ARKOMA ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondent Arkoma Associates in opposition to the petition of C.T. Carden, Leonard L. Limes, and Magee Drilling Company for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

STATEMENT OF THE CASE

Respondent Arkoma Associates, an Arizona limited partnership, filed this action in the United States District Court for the Eastern District of Louisiana seeking a

[1] The decision of the Court of Appeals in *Arkoma Associates v. C.T. Carden, et al.*, No. 87-3624, is set forth in full as Appendix "A" to petitioners' petition.

money judgment in the amount of $560,000 against C.T. Carden and Leonard L. Limes as guarantors of an equipment lease between Arkoma Associates and Magee Drilling Company, an intervenor in this action. Contrary to the obtuse reference on page two of petitioners' petition, the lease was executed by Arkoma Associates through its general partners and not by the "various individuals comprising and in the name of respondent." To suggest, as petitioners do, that an amalgam of individuals are involved is to completely ignore the articles of limited partnership and the Uniform Limited Partnership Act under which Arkoma Associates was created.

Petitioners moved to dismiss Arkoma's action for lack of diversity jurisdiction. C.T. Carden and Leonard Limes are both citizens of Louisiana. Of the four general partners of Arkoma Associates, two are citizens of Arizona and two are citizens of Oklahoma. Of the forty-four limited partners of Arkoma Associates, only one is a citizen of Louisiana.

The district court denied petitioners' motion to dismiss, holding that diversity jurisdiction existed, but certified the issue for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Fifth Circuit Court of Appeals denied petitioners' petition for review of the district court's interlocutory order. Carden and Limes petitioned this Court for a writ of certiorari. That petition was also denied.

The district court then tried this case on the merits and granted judgment in favor of respondent. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's judgment, rehearing was denied, and petitioners filed this application for certiorari.

REASONS FOR DENYING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action does not conflict with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). To the contrary, the decision of the Fifth Circuit Court of Appeals in this action is based on this Court's "real parties to the controversy" test enumerated in *Navarro*.

2. There is no conflict in the decision of the Fifth Circuit Court of Appeals and those of the Third, Fourth, and Seventh Circuit Courts of Appeals regarding the determination of diversity jurisdiction is cases in which a limited partnership is a party. The Third, Fourth, and Seventh Circuit Courts of Appeals have simply declined to follow the test this Court developed in *Navarro*.

ARGUMENT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS THE REASONING SET FORTH IN THE DECISION OF THIS COURT IN *NAVARRO SAVINGS ASSOCIATION V. LEE*.

Simply stated, there is no reason for this Court to review the decision of the Fifth Circuit Court of Appeals. The Fifth Circuit's decision was based on its previous opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F.2d 238 (5th Cir. 1986), which, itself, was squarely based on this Court's sound reasoning in *Navarro*.

In *Navarro*, this Court described the historical basis of diversity jurisdiction. As this Court stated:

> Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 USC §1332(a)(1) . . . and U.S. Const, Art III, §2. Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties to the controversy*. . . . Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of *real parties to the controversy*.

Navarro Savings Association v. Lee, 446 U.S. 458, 460-61, 100 S.C.t. 1779, 1781-82, 64 L.Ed.2d 425, 429 (1980) (citations omitted, emphasis added).

In *Navarro*, this Court had to decide whether to look to the citizenship of the beneficiaries of a business trust or to that of the trustees. Characterizing the business trust as "neither an association nor a corporation," although having some attributes of both, 446 U.S. at 462, 100 S.Ct. at 1782, 64 L.Ed.2d at 430, the Court held that the trust's resemblance to other forms of business enterprises was irrelevant to the determination of whose citizenship determined diversity jurisdiction. 446 U.S. at 465, 100 S.Ct. at 1784, 64 L.Ed.2d at 432. The Court opined that the test for diversity jurisdiction should focus on the "real parties to th[e] controversy." 446 U.S. at 462, 100 S.Ct. at 1782, 64 L.Ed.2d at 430. The Court defined these parties as those who have the power to "hold, manage, and dispose of assets for the benefit of others," and to control the litigation of same. 446 U.S. at 464-65, 100 S.Ct. at 1783-84, 64 L.Ed.2d at 431-32.

In this case, the Fifth Circuit Court of Appeals held that its recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F.2d 238 (5th Cir. 1986), was dispositive of the jurisdictional issue.

In *Mesa*, the Fifth Circuit applied this Court's "real parties to the controversy" test in its decision to consider only the citizenship of the general partners. While acknowledging that the *Navarro* holding was limited to trusts, the Fifth Circuit, in *Mesa*, saw no reason not to apply this Court's reasoning in *Navarro* to a situation that it equally fits.

> The correct analogy to be drawn is not between the types of business enterprise involved, but between application of the Court's test in *Navarro* to another enterprise. The Court held the trustees the real parties to the controversy because they, and they alone among the membership, held title to the assets, managed the assets, and controlled any litigation involving the trust. Similarly, in the limited partnership here, the general partners, and they alone as against the limited partners, control and manage assets, conduct all business and control all litigation. In the absence of specific direction from the Supreme Court, we think the proper course is to apply the analysis made by the Court in *Navarro* to the facts before us.

Mesa Operating Limited Partnership, 797 F.2d at 242.

The Fifth Circuit, in *Mesa*, also pointed out that this Court, in *Navarro*, suggested that diversity jurisdiction should be a question capable of a simple and immediate answer. The Fifth Circuit stated:

> Where jurisdiction depends on citizenship of general partners and a showing that they have exclusive management and control of assets and litigation, determination of citizenship would be both faster and easier than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing.

Id. at 243, n.2.

That simple and immediate answer can be obtained easily by application of this Court's "real parties to the controversy" test. Because the Fifth Circuit applied that test to a situation analogous to the facts in *Navarro*, it is clear that the Fifth Circuit's decision does not conflict with this Court's decision in *Navarro*, but follows it.

2. THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND THOSE OF THE THIRD, FOURTH, AND SEVENTH CIRCUIT COURTS OF APPEALS REGARDING THE DETERMINATION OF DIVERSITY JURISDICTION IN CASES INVOLVING LIMITED PARTNERSHIPS ARE NOT IN CONFLICT.

Because the test to be applied in determining the citizenship of a *sui generis* organization for diversity jurisdiction has been set forth by this Court in *Navarro*, it is not necessary for this Court to hear this case. The fact that the other circuits have declined to apply the *Navarro* test to limited partnerships does not create a conflict within the circuits.

> The reasoning of the other circuits comes down to a disinclination to expand diversity jurisdiction without congressional authorization. . . . If determination of diversity jurisdiction rests on the test the Supreme Court developed in *Navarro*, diversity jurisdiction extends only to the precise parties to whom it should extend: that is, the real parties to the controversy. While this may arguably create diversity expansion, it is more semantics than principle. . . . Here we are dealing only with which already extant citizens are involved in the case; the issue here is merely a necessary interpretation of existing law.

Mesa Operating Limited Partnership, 797 F.2d at 241-42 (citations omitted).

Furthermore, there is no indication in the reasoning of those cases found in the other circuits that suggests that the outcome of those cases would be any different under an application of the *Navarro* test.

3. THE FIFTH CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE GENERAL PARTNERS OF ARKOMA ASSOCIATES ARE THE REAL PARTIES TO THE CONTROVERSY.

As mentioned above, this Court, in *Navarro*, defined the "real parties to the controversy" as those with the power to own, manage, and control the assets of the entity and to control its litigation. Applying that definition, the Fifth Circuit, in *Mesa*, described the powers of both the general and limited partners.

> Mesa's Amended and Restated Agreement of Limited Partnership . . . provides that the general partners have full authority without limitation to conduct all business; expend or encumber all assets; negotiate, enter into, execute and perform all contracts and conveyances; and control all matters affecting rights and obligations of the partnership, "including the conduct of litigation." . . . In contrast, the limited partner is to take no part in operation, management or control of the partnership. . . . The limited partner cannot remove the general partners. . . . The limited partner can dissolve the partnership only after withdrawal of a general partner or an event which removes him. . . . The limited partner can amend the agreement only with consent of the general partners where such amendment has any legal effect on the general partners; the general partners

> may amend without agreement of the limited partner in a number of ways.

Id. at 242 (citations omitted).

Based on the foregoing, the Fifth Circuit concluded that the general partners of Mesa had exclusive power to manage and control all assets, conduct all business, and control all litigation; that the general partners were the real parties to the controversy; and, therefore, that only their citizenship was relevant to the determination of diversity jurisdiction. *Id.* at 243.

The Arkoma Associates Limited Partnership Agreement[2] clearly reflects that the general partners are vested with complete control of the management and operation of the partnership. Article 6.1 of the Limited Partnership Agreement provides:

> The General Partners shall manage and shall have exclusive and complete control of the operations of the Partnership and shall have power to do all things necessary or advisable to carry out the purposes of the Partnership.

Without limiting the generality of the foregoing statement, Article 6.1(a-m) of the Partnership Agreement sets forth specific powers granted to the general partners:

> (a) to expend Partnership funds in furtherance of the business of the Partnership and to acquire the Rigs and to execute, deliver and carry out the terms of the Lease on behalf of the Partnership;

[2] The complete text of the Arkoma Associates Limited Partnership Agreement is not reproduced here. It was a trial exhibit and included in the record on appeal to the Fifth Circuit Court of Appeals.

> (b) to lend money of the Partnership to affiliates of any of the General Partners; (c) to hold, improve, maintain, operate, finance, lease, sell, dispose of and otherwise deal with and invest in the Rigs; (d) to enter into joint ventures, farmouts, contract drilling or other arrangements involving the use of the Rigs with any person including affiliated parties; (e) to pay all debts and obligations of the Partnership; (f) to lend money to the Partnership and secure such indebtness by pledging assets of the Partnership; (g) to make such elections under the tax laws of the United States, the several states and other relevant jurisdictions as to the treatment of items of Partnership income, gain, loss, deduction and credit, and as to all other relevant matters, as it believes necessary or desirable; (h) to determine the terms of the offering of Limited Partnership interests, including the amount of discounts allowable, commissions to be paid and the manner of complying with applicable law; (i) to execute an agreement(s) with affiliated or unaffiliated persons or entities in connection with the offering and sale of Partnership interests; (j) to employ such agents, employees, independent contractors, attorneys and accountants as the General Partners deem reasonably necessary, including persons affiliated with the General Partners; (k) to effect necessary insurance for the proper protection of the Partnership and (1) of the General and Limited Partners, or (2) of either the General Partners or Limited Partners; (l) to pay, collect, compromise, arbitrate, or otherwise adjust any and all claims or demands of or against the Partnership; (m) to bind the Partnership in all transactions involving the Partnership's property or business affairs.

The Partnership Agreement also grants other powers to the general partners. In Article 3.4, the agree-

ment specifies that the partnership can borrow funds from the partners if the general partners determine, for any reason, that the business of the partnership requires additional capital. Article 4.4 of the agreement states that cash distributions are to be made quarterly or at more frequent intervals if the general partners so determine. Article 5.1 of the agreement states that the general partners have total discretion to select the method to calculate depreciation of any depreciable partnership assets. Article 5.2 of the agreement states that the general partners are responsible for preparing a report of the partnership's operations to be examined and reported upon by an independent certified public accountant.

Conversely, the limited partners have absolutely no management authority over the operations of the partnership. In fact, Article 7.1 provides:

> The Limited Partners shall not take any part in the control or management of or transact any business for the Partnership, nor shall the Limited Partners have power to sign for or to bind the Partnership.

The Partnership Agreement also restricts the limited partners' power and authority in other ways. Article 3.5 of the agreement states that no limited partner has the right to withdraw or reduce his contribution to the capital of the partnership unless the partnership is dissolved or as otherwise provided in the agreement. Article 10.1 of the agreement provides that each of the limited partners grants an irrevocable power of attorney to the general partners to draft and execute the necessary documents and modifications thereto to operate the partnership and to obtain loans on behalf of the partnership.

Based on the foregoing, it is clear that the four general partners, who are citizens of Arizona and Oklahoma, are the real parties to the controversy.

CONCLUSION

Petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals is contrary to this Court's decision in *Navarro Savings Association v. Lee.* Also, petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals is in conflict with the decisions of the Third, Fourth, and Seventh Circuit Courts of Appeals regarding the determination of diversity jurisdiction in cases involving limited partnerships. Finally, it is clear that the Fifth Circuit Court of Appeals correctly applied this Court's "real parties to the controversy" test when it considered only the citizenship of the general partners for purposes of diversity jurisdiction.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
LOWE, STEIN, HOFFMAN & ALLWEISS

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Counsel for ARKOMA ASSOCIATES,
Respondent

Dated: New Orleans, Louisiana
April 8th, 1989.

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Richard K. Ingolia, Esq., Berke & Ingolia, 200 Oil & Gas Building, 1100 Tulane Avenue, New Orleans, Louisiana, 70112 this 8th day of April, 1989.

/s/ Mitchell J. Hoffman

(3)

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1476

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES, and MAGEE DRILLING COMPANY,
Petitioners

v.

ARKOMA ASSOCIATES, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
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C. T. Carden, Leonard L. Limes,
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Arkoma Associates, et al.,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

This brief is submitted by petitioners, C. T. Carden, Leonard L. Limes, and Magee Drilling Company (hereafter "Carden", "Limes", "Magee", or collectively "Petitioners"), in reply to the opposition brief of Arkoma Associates (hereafter "Respondents").

Petitioners seek review of the decision of the Fifth Circuit Court of Appeals in this action on two grounds: (1) because that Court held diversity jurisdiction exists herein although Respondents are a purported limited partnership one of whose purported limited partners is a citizen of Louisiana as are petitioners, Carden and Limes, which holding conflicts with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 421 (S. Ct. 1980), and (2) there is a conflict among

the decisions of the Second and Fifth Circuits on the one hand, and those of the Third, Fourth, and Seventh Circuits on the other, relative to the presence or absence of diversity jurisdiction in cases wherein a limited partnership, some of whose limited partners possess the same citizenship as adverse parties, is a litigant.

Conflict with Navarro:

Respondents argue that there is no conflict between the decision of the Fifth Circuit in this case and that of this Court in *Navarro*, supra, despite the fact that in its decision this Court cites a limited partnership as an example of an unincorporated association the citizenship of all of whose members must be considered in determining diversity jurisdiction. (Cf. *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900), cited at 100 S. Ct. 1782.)

Respondents attempt to support their sophistic position arguing that this Court sustained diversity jurisdiction in *Navarro* because it determined the real parties at interest and tested diversity jurisdiction based on those parties' citizenship alone. Respondents neglect to mention the Court's essential point of departure, i.e. it first determined that the entity at issue in *Navarro* was not a partnership, but a business trust. After determining that it was dealing with a trust, the Court next established the authority of the trustees from the declaration of trust which was held to be:

> . . . . exclusive authority over this property "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . " The respondents have power to transact Fidelity's business, execute documents, and "sue and be sued in the name of the Trust or in their names as Trustees of the Trust." They may invest the funds of the trust, lend money, and initiate or compromise lawsuits relating to the trust's affairs.

The Court turned to an analysis of the authority of the trustees only after determining that Fidelity was not a partnership, holding that, because they were trustees, they were the real parties at interest whose citizenship determined the presence or absence of diversity jurisdiction. This appears from the Court's remarks from 100 S. Ct. 1779 at page 1782, to wit:

> But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to the controversy for purposes of a federal court's diversity jurisdiction.
>
> As early as 1808, this Court stated that trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. . . . Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties at interest for procedural purposes.

No one giving the remarks of this Court a fair and realistic interpretation can fail to realize that, had the entity involved in *Navarro* been a limited partnership, this Court would have held there was no diversity jurisdiction.

In footnote number 9, this Court clearly explains its meaning when it refers to the trustees as real parties in interest, and the extent to which their being real parties in interest, and the extent to which their being real parties in interest affects diversity jurisdiction, to wit:

> There is a "rough symmetry" between the "real party in interest" standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversity. But the two rules serve different purposes and need not produce indentical outcomes in all cases. . . . In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17(a). To establish diversity, however, the union must rely on the citizenship of each of its members. *Steelworkers v. Bouligny, Inc.* . . .

Thus, a litigant being a real party in interest is not sufficient in itself to confer diversity jurisdiction. In addition to being a real party in interest, a litigant must also possess citizenship that is diverse from that of all opposing parties. This Court found that diversity jurisdiction obtained in *Navarro* because *Federal Rule of Civil Procedure 17(a)* in pertinent part provides:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . .

In *Navarro* the Court clearly holds that if an organization is an express trust, the citizenship of the trustees alone need be considered in determining diversity jurisdiction because *Federal Rule of Civil Procedure 17(a)* so provides. It is this distinction, explained by this Court in footnote 9, supra, which the Fifth Circuit fails to take into account when it attempts to apply the *Navarro* decision to a limited partnership.

The inevitable consequence of Respondents' argument is the conclusion that the limited partners are not real parties at interest although, in the partnership at issue, they own 99% of the partnership while the general partners own 1%.

In that a limited partnership is an unincorporated association, both the general and limited partners are real parties at interest in the sense that members of each group own an interest in the entity. Therefore, the citizenship of members of neither group may be ignored when determining the presence or absence of diversity jurisdiction as this Court has repeatedly held. See *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900); *United Steelworkers of America v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965); and *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800 (S. Ct. 1889).

Conflicts Among the Circuits:

The second point of Respondents' argument, in which they state that there is no conflict among the decisions of the Fifth Circuit and those of the Third, Fourth, and Seventh Circuits regarding diversity jurisdiction in cases wherein a limited partnership is a party, is grossly wrong. The error of such statement is obvious to anyone who takes the time to read the decisions. For example, in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984) the Seventh Circuit states that:

> ThermaSol bases its argument for an exception to the rule on an analogy between a limited partnership and an express business trust. ThermaSol points out that general partners, like a trustee, manage the assets of a limited partnership, and

> control litigation involving the partnership. . . Because the Court held in *Navarro Saving Ass'n v. Lee* . . . , that only the trustee of an express business trust was a "real party" to controversies involving the trust, ThermaSol concludes that only the general partners are "real parties" to controversies involving a limited partnership.
>
> In *Navarro*, The Supreme Court explicitly rejected the very analogy upon which ThermaSol now relies.

In *Carlsberg Resources Corporation v. Cambria Savings and Loan Association*, 554 F. 2d 1254 (3rd Cir. 1977) the Third Circuit held:

> This case poses an intriguing problem concerning the diversity jurisdiction of the federal courts. Specifically we must ascertain whether an identity of citizenship between a number of limited partners of a plaintiff partnership and the defendants precludes an exercise of diversity jurisdiction. . . .
>
> When the rule of complete diversity is read in conjunction with the principle that the citizenship of a partnership depends upon that of its members, it becomes clear that diversity jurisdiction may not obtain here, unless *all* of the members of the plaintiff partnership are of distinct citizenship from all of the defendants. Since such diversity in citizenship is lacking, the district court properly dismissed the complaint for want of jurisdiction.

In *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981) the Third Circuit stated that:

> Analysis of the diversity issue must begin with the undisputed proposition that a limited partnership is an unincorporated association whose citizenship is deemed to be that of the "persons composing such association." . . . Applying that holding to the precise issue raised here, this court held that the citizenship of a limited partner will defeat diversity if it is the same as one of the parties on the opposing side. *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n* . . .
>
> First Federal urges us to abandon the holding of *Carlsberg Resources* on the ground that the subsequent decision of the Supreme Court in Navarro Savings Ass'n v. Lee . . . requires that we apply a "real party in interest" test in determining Trent's citizenship. It argues that under the analysis in *Navarro*, only the general partners are such parties here. We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources*.

In *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985) the Fourth Circuit held:

> Thereafter, the Supreme Court held in *Navarro Savings Ass'n v. Lee*, . . . that only the citizenship of the trustees of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction. Although the Court recognized the *Chapman-Great Southern* rule for unincorporated associations, it explained that the express trust was "neither an association nor a corporation for purposes of the diversity analysis."
> . . . The Court also explained in a foot note that:
> "The Court has never analogized express trusts to business associations for purposes of diversity jurisdiction. . . . Clearly, *Navarro* does not

> authorize the extension of the use of the "real party-in-interest" test in cases of trusts to business associations, such as limited partnerships.

In glaring contrast to the foregoing jurisprudence, in the instant case the Fifth Circuit held:

> On the other hand, if Arkoma is a limited partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. See *Navarro Savings Association v. Lee*, 446 U. S. 458 (1980).

In addition to the jurisprudence of the Third, Fourth, and Seventh Circuits refusing to ignore the citizenship of limited partners when determining the existence of diversity jurisdiction, the more recent decision of the Eighth Circuit may be added. In *Stouffer Corporation v. Breckenridge*, 859 F. 2d 75 (8th Cir. 1988), the plaintiff, Stouffer, an Ohio corporation, was the general partner of a limited partnership. Some of the limited partners were Missouri citizens as was the defendant. The district court confronting the conflict in the decisions of the Second and Fifth Circuits on the one hand, and those of the Third, Fourth, and Seventh Circuits on the other, denied defendant's motion to dismiss for lack of diversity jurisdiction, but certified the question for interlocutory appeal. The Eighth Circuit granted the appeal, reviewed the jurisprudence, reversed the denial of the motion to dismiss, and ordered the case dismissed for lack of diversity jurisdiction, holding:

> Having granted the request, we conclude the citizenship of limited partners must be considered

> in determining diversity jurisdiction. We therefore remand the case to the district court with directions to dismiss for lack of jurisdiction.
>
> It is well established that diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all of those on the other. . . A corporate litigant has long been conclusively presumed to be a resident of its state of incorporation. . . . An unincorporated association, however, has traditionally been viewed as a citizen of the state of each of its constituent members. . . . That traditional, narrow view of federal jurisdiction over unincorporated associations was challenged but reaffirmed in *United Steelworkers v. R. H. Bouligny, Inc.* . . . Appellate decisions in three circuits mandate consideration of the citizenship of limited partners. (Citing *New York Teachers, Elston, Trent,* and *Carlsberg.)* Two circuits have adopted a less restrictive approach, deciding on a case by case basis whether the limited partner is a real party to the controversy. . . .
>
> The reasons for the rule we adopt are well explained in the above-cited decisions from the Third, Fourth, and Seventh Circuits. A limited partnership is one form of unincorporated association, and the court has long required consideration of the citizenship of all members of such associations. Therefore this rule is "more consonant with Supreme Court precedent." . . .
>
> Finally, we reject the plaintiff's contention that the Court in *Navarro Sav. Ass'n v. Lee* . . . changed direction and now requires a detailed determination whether nondiverse citizens are real parties to the controversy in all cases involving

unincorporated associations. The Court explicitly stated that the case involved "an express trust" and "neither an association nor a corporation."

Respondent's contention that there is no conflict among the decisions is egregiously wrong.

CONCLUSION

The court should grant the requested writ of certiorari, resolve the conflict among the decisions of the Circuits, reverse the Fifth Circuit, and dismiss this case for lack of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record by depositing the same in the U. S. Mail, postage prepaid this 18th day of April, 1989.

I further certify that all parties required to be served have been served.

_____
Richard K. Ingolia

Supreme Court, U.S.
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In The

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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CHRONOLOGICAL LIST OF
RELEVENT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/23/85	1	Complaint Issd., 2 Summs.
6-19-85	2	Defts', C. Tom Carden and Leonard L. Limes Mtn. & ORDERED that same have an additional 20 days to file responsive pleadings. (AJM) 6-23-85 dktd. 6-24-85.
6-27-85	3	Rtn. of summs. to C. Tom Carden and Leonard L. Limes svd. 5-30-85.
7-12-85	4	Rtn. of summs. to Orri Navigation LInes (sic) svd.7-11-85.
7-12-85	5	*ANSWER* of C. Tom Carden and Leonard Limes to Pltf's compl.t (sic) and counterclaim agnst Arkoma Associates.
7-16-85	6	Ntc. of Phone Conf. set for 7-30-85 at 11:15 a.m. (AJM) dktd. 7-17-85.
8-1-85	7	M.E. 7-30-85; Phone Conf. held; Amends. to be filed w/in 30 days; final PTC set for 2-26-86 at 8:30 a.m.; TRIAL w/out jury set for 3-10-85 at 9:00 a.m. (AJM) dktd. 8-1-85.
8-13-85	8	*ANSWR* (sic) of Arkoma Associates to Counter claim of C. Tom Carden and Leonard Limes.
9/4/85	9	Deft's mtn & ORDER that Richard K. Ingolia be enrolled as co-counsel for defts. (AJM) 9/4/85; dktd. 9-5-85.
10-9-85	10	Pltf's Ntc. of Depo. of Don Magee on 10-14-85.
10-9-85	11	Pltf's Ntc. of Depo. of Larry Burnett on 10-14-85.

DATE	NR.	PROCEEDINGS
11-21-85	12	Pltf's Ntc. of Depo. of C. Tom Carden on 12-6-85.
11-21-85	13	Pltf's Ntc. of Depo. of Leonard Limes on 12-6-85.
12-5-85	14	Defts' Mtn. for Summ. Judg; HRG. set for 1-15-86 at 10:00 a.m. w/judge.
12/17/85	15	Defts' mtn to partially dismiss for failure to state a claim; hrg set 1/15/86, 10am bfr judge.
12-24-85	16	Pltf's Witness List.
12-27-85	17	Defts' Witness List.
12-31-85	18	Mtn. of Magee Drilling Company to Intervene as a Deft.; HRG set for 1-15-86 at 9:00 a.m. w. Mag. Fonseca.
12/31/85	19	Mtn of defts for leave to amend answer & counterclaim; Hrg set 1/15/86 at 9:00 a.m. bfr Mag RAF.
12-30-85	20	Pltf's Mtn. & ORDERED that defts' Mtn. for Summ. Judg. set for 1-15-86 is CONTINUED to 1-29-86 at 10:00 a.m. w/ Judge. (AJM) 1-2-86 dktd. 1-3-86.
1-10-86	21	Defts' Mtn. & ORDERED taht (sic) the hrg. on their mtn. to amend their answer and Magee's Mtn. to intervene set for hrg. on 1-15-86 is CONTINUED to 1-29-86 at 9:00 a.m. w/ Mag. Fonseca. (AJM) 1-8-86 dktd. 1-9-86.
1-14-86	22	Pltf's Mtn. for Summary Judgment; HRG. set for 1-29-86 at 10:00 a.m. w/ Judge.
1-21-86	23	Pltf's ntc of depos of C. Tom Carden on 1-24-86.

DATE	NR.	PROCEEDINGS
1-21-86	24	Pltf's ntc of depos of Leonard L. Limes on 1-24-86.
1-21-86	25	Pltf's memo in oppos to mtn by Magee Drilling Co to intervene.
1-21-86	26	Pltf's memo in oppos to mtn by defts' for leave to amend answer & counterclaim.
1-21-86	27	Memo by defts in oppos to pltf's mtn for summ judg.
1-21-86	28	Pltf's memo in oppos to defts' mtn to partially dismiss for failure to state a claim.
1-30-86	29	M.E. 1-29-86; HRG. on Magee Drilling's Mnt. to Intervene – ORDERED DENIED. (MAG. FONSECA) dktd. 1-30-86.
1-30-86	30	M.E. 1-29-86; HRG. on deft's Mtn. for Leave to Amend Answers – ORDERED GRANTED and Mnt. for Leave to Amend Counterclaim – ORDERED DENIED. (MAG. FONSECA) dktd. 1-30-86.
2-4-86	31	Pltf's Mnt. & ORDERED that same has has (sic) leave to file the Reply Memo. in support of pltf's Mtn. for Summ. Judg. (AJM) 2-1-86 dktd. 2-5-86.
2-4-86	32	Defts' Supple Memo. in Support of Their Mtn. for Summ. judg and in Oppo. to Pltf's Mtn. for Summ. Judge.
2-4-86	33	Pltf's Reply Memo In Support of Pltf's Mtn. for Summ. Judge.

DATE	NR.	PROCEEDINGS
2-6-86	34	M.E. 2-4-86; ORDERED that Pltf's Mtn. for Summ Judg. and Defts' Mtn. for summ. Judg are DENIED. FURTHER ORDERED that defts' Mtn. to Partially Dismiss Pltf's Complt for failure to state a claim is DENIED. (AJM) dktd. 2-7-86.
2-6-86	35	Mtn by defts & ORDER hrg on Mtns to Reconsider Mag's Orders is set 2-26-86 at 10:00 a.m. (AJM) DKTD 2-10-86.
2-7-86	36	Mtn by defts for Reconsideration of Mag's Order.
2-10-86	37	Defts' Mtn. to Dismiss for Lack of Jurisdiction; HRG. set for 2-26-86 at 10:00 a.m. w/ Judge.
2-18-86	38	Pltf's Memo. in Oppo. to Mtn. to Dismmiss (sic).
2-18-86	39	Pltf's Memo. In Oppo. to Defts' Mtn. for Reconsideration of Mag's Order.
2-18-86	40	Pltf's Mtn. & ORDERED that the Mtn. to Dismiss for Lack of Jurisdiction and the Mtn. to Review the Mag's Rulings will be heard at the PTC set for 8:30 a.m. on 2-26-86 (AJM) 2-18-86 dktd. 2-19-86.
5-5-86	58	M.E. 5-5-86; HRG. on defts' Mtn./ to Amend Answer & Counterclaim; Mtn. of Magee to Intervene; Deft's and Mageee (sic) Drilling Co. to Ext. the Disc. Deadline – ORDERED re-hrg. is set for 5-7-86 bfr. Mag. (MAG. FONSECA) dktd. 5-6-86.

DATE	NR.	PROCEEDINGS
6-16-86	59	(5th Cir) ORDERED taht (sic) Pet. of Carden and Limes for leave to appeal an interlocutory order denying their mtn. to dism Pltfs' action for lack of diversity is held in abeyance pending Ct's decision in 86-3128, Mesa Operating Ltd. Partnership v. La. Intrastate Gas Corp. dktd. 6-17-86.
6-25-86	60	Ntc. of Phone Conf. set for 7-8-86 at 3:15 p.m. (AJM) dktd. 6-25-86.
6-26-85 (sic)	61	M.E. 6-26-86; Mtn. of defts for Leave to file an Amended Answer and to Amend Counter-Claim is GRANTED and the Mtn. of Magee Drilling Commpany to Intervene is GRANTED. (AJM) dktd. 6-26-86.
7-9-86	62	M.E. 7-8-86; Phone Conf. held; Amends to be filed w/in 30 days; final PTC set for 2-2-87 at 1:15 p.m.; TRIAL w/out jury set for 2-9-87 at 9:00 (AJM) dktd. 7-10-86.
7-10-86	63	*AMENDED ANSWER* of C.T. Carden and Leonard Limes to complt and Counterclaim agnst. Arkoma.
7-10-86	64	*ANSWER* of Magee Drilling Company to Comp!t of Arkoma.and counterclaim angst. Arkoma, David Hepburn, Eldon Qualls, Richard Ledbetter and Dudley Merkel. 4 summs. Is.
8-5-86	65	Petition of Intervention of Magee Drilling Company.
8/5/86	66	Ex Parte mtn of Magee Drilling & ORDER granting leave to file amended answer & counterclaim (AJM) 8/6/86 dktd 8/7/86.

DATE	NR.	PROCEEDINGS
8/6/86	67	Intervenor's amended answer & counterclaim.
8/5/86	68	Ex Parte mtn of C. T. Carden & Leonard L. Limes & ORDER granting leave to file amended answer & counterclaim (AJM) 8/6/86 dktd 8/7/86.
8/7/86	69	*Amended Answer* & Counterclaim of C.T. Carden & Leonard L. Limes; no new ptys added.
9-19-86	70	(5th Cir.) ORDERED that Pltf. Petitoin (sic) is DENIED. dktd. 9-22-86.
9-23/86	71	Pltf's *Answer* to Defts' Amended Answer and Counterclaim.
9-23-86	72	Defts', David Hepburn, Eldon Qualls, Richard Ledbetter and Dudley Merkel Mtn. To Dismiss; HRG. set for 10-8-86 at 10:00 w/ judge.
9/23/86	73	Pltf's *Answer* to intervenor Magee Drilling Co answer & counterclaim.
9-30-86	74	Intervenor's memo. in Oppo. to Counter Claim defts' Mtn. to Dism.
11-13-86	75	M.E. 11-12-86; The Motion of Arkoma to Dism. is DENIED. (AJM) dktd. 11-14-86.
12/4/86	76	Pltf's witness list.
1/6/87	77	ANSWER of Arkoma Assoc, David A. Hepburn, Eldon E. Qualls, Richard K. Ledbetter, & Dudley B. Merkel to counter claim of C. Tom Carden & Leonard L. Limes.
1/6/87	78	ANSWER of Arkoma Assoc, David A. Hepburn, Eldon E. Qualls, Richard K. Ledbetter, & Dudley B. Merkel to counterclaim of Magee Drilling co. (sic)

DATE	NR.	PROCEEDINGS
1-20-87	79	Intervenor's Req. & Issd. 3 usbps.
1-23-87	80	Rtn. of subps. to Richard Ledbetter, Arkoma Assoc and Elden (sic) Qualls svd. 1-22-87.
2-3-87	81	PTO: PTC held on 2-2-87; TRIAL w/out jury set (AJM) dktd. 2-3-87.
2-3-87	82	M.E. 2-2-87; ORDERED that TRIAL is CONTINUED to 5-20-87 at 10:00. PTC is CONTINUED to 5-12-87 at 4:00 (AJM) dktd. 2-4-87.
2-11-87	83	Req. by defts', Carden & Limes & Issd. 5 subps.
3/31/87	84	Ntc of dep by C. Tom Carden, Leonard L. Limes & Magee Drilling Co of United Rig Builderees (sic), Unirig, INc,, (sic) Clifford W Cunningham, Jr., & James t. Littlepage on 4/6/87.
4-9-87	85	Intervenor's Ntc. of Dep. of Don Young on 4-15-87.
4-13-87	86	Intervenor's Ntc. of Dep. of United Rig Builders, Clifford Cunningham Jr. and James Littlepage on 4-17-87.
4-23-87	87	Mtn. of C. Carden and Leonard Lines (sic) & Intervenor, Magee Drilling Co. & ORDERED that an Exped. Hrg. is set for 5-6-87 (AJM) 4-24-87 dktd. 4-27-87.
4-27-87	88	Mnt. of C.T. CArden (sic) & Leonard Limes for Cont. of Trial on Merits.
4-30-87	89	Intervenor's Ntc. of Dep. of Don Young on 5-11-87.
5-1-87	90	Intervenor's Ntc. of Dep. of Don Young on 5-8-87

DATE	NR.	PROCEEDINGS
5/4/87	91	Opp of Arkoma Asso., Dudley Merkel, David Hepburn, Richard Ledbetter, & Eldon Qualls to mtn of cont by C.T. Carden, Leonard Limes & Magee Drilling Co.
5-6-87	92	HRG. on Defts' Mtn. to Cont. Trial of 5-20-87 – ORDERED DENIED. dktd. 5-6-87.
5-6-87	93	Pltf's Mtn. & ORDERED that the firm of Lowe, Stein, Hoffman & Allweiss are subst. as attys' for same. (AJM) 5-6-87 dktd. 5-7-87.
5-14-87	94	Supple & Amended PTO TRIAL set for 5-20-87 w/out jury (AJM) dktd. 5-14-87.
5-14-87	95	Joint mtn & ORDER that John A. Gordon & Blake Arata be enrolled as addt'l counsel for C. T. Carden, L. L. Limes & Magee Drilling. (AJM) 5-18-87, dktd 5-18-87.
5/21/87	96	Dep of Eldon Qualls tken (sic) on 9/23/85.
5/21/87	97	Dep of Larry C. Burnett taken on 10/14/85.
5/21/87	98	Dep of Don Young taken on 5/8/87.
5/21/87	99	Dep of James Littlepage taken on 4/17/87.
5/21/87	100	Dep of Robert Wagener taken on 2/25/86.
5/21/87	101	Dep of Clifford Cunningham taken on 4/17/87.
5/21/87	102	Dep of Floyd Yeager taken on 5/28/86.
5/21/87	103	Dep of Joe Claus taken on 1/11/87.

DATE	NR.	PROCEEDINGS
5/20/87	95a	NON JURY TRIAL: witnesses called; CONTD to 5/21/87, 9am bfr judge (AJM) dktd 5/29/87.
5/21/87	104	N/J TRIAL CONTD: witnesses called; proposed Findings of Fact & Conclusions of Law to be filed 15 days after receipt of transcript of trial; that matter will be taken under submission (AJM) dktd 5/29/87.
6/24/87	104	Transcript of Trial held on 5/20 & 5/21/87 bfr Judge. (VOL. I)
6/24/87	105	Transcript of Trial held on 5/20 & 5/21/87 bfr JUdge. (sic) (VOL. II)
6-26-87	106	Joint mtn and ORDER that Suggesting Findings of Fact, Conclusion of Law and Post-Trial Memo shall be filed by 7-19-87. (AJM) 6-29-87 DKTD 6-29-87.
7-29-87	107	Pltf's Trial Memorandum.
7-29-87	108	Post-Trial Memorandum of Arkoma, David Hepburn, Qualls, Ledbetter and Merkel.
7-29-87	109	Pltf's Proposed Findings of Fact and Conslcusions (sic) of Law.
7-29-87	110	Findings of Fact and Conclusions of Law subm by Defts' & Intervenor.
7-29-87	111	Trial Memo. of Defts' & Intervenor's.
7-29-87	112	Post Trial Memo. of Defts' & Intervenor's.
7-29-87	113	FINDINGS OF FACT & CONCLUSIONS OF LAW. (AJM) 7-29-87 dktd. 7-29-87.

DATE	NR.	PROCEEDINGS
7-29-87	114	JUDGMENT: ORDERED in favor of Pltf. and angst (sic) defts' for $467,806.25 plus int. from 2-18-85 til (sic) paid; In favor of Arkmoa, (sic) David Hepburn, Qualls, Ledbetter and Merkel dismissing Counterclaim filed by C. Tom Carden and Limes w/ prej at their costs; In favor of Arkoma, Hepburn, Qualls, Ledbetter and Merkel dism the Intervention and Counterclaim of Magee Drilling w/ prej. at its costs. (AJM) 7-29-87 dktd. 7-29-87.
8-5-87	115	Pltf's Mtn. to Amend Findings of Fact and Conclusions of Law, for New Trial, and to Dism; HRG. set for 8-26-87 at 9:00 w/ Judge.
8-6-87	116	TRANSCRIPT of proceedings held on 5-20-87 and 5-21-87 bfr. Judge.
8-6-87	117	TRANSCRIPT of proceedings held on 5-20-87 and 5-21-87.
8-10-87	118	Pltf's Mtn. to Amend Judgment; HRG. set for 9-9-87 at 9:00 w/ Judge.
8-10-87	119	Pltf's Opo. to Mtn. for Extension to Stay.
8-5-87	115a	Mtn. of defts' & Intervenor & ORDERED ...at the judg. entered on 7-29-87 is stayed til 30 days after the disposition of mtn. to amend findigns (sic) of fact and conclusions of law, for new trial, and to dism. (AJM) 8-12-87 dktd. 8-13-87.
8-5-87	115b	Mtn. of Defts' and Intervenor & UNSIGNED ORDER to Subst. Letter of credit for Bondg. (sic)

DATE	NR.	PROCEEDINGS
8-7-87	117a	Mtn. of defts' & Intervenor & ORDERED that the Supple Mtn. and Amend Findings of Fact and Conclusions of Law, For New trial and to Dism. are allowed to be filed. (AJM) 8-12-87 dktd. 8-13-87.
8-12-87	120	Supplemental Mtn. to Amend Findings of Fact and Conslusions (sic) of Law, For New Trial, and to Dism.
8-13-87	121	M.E. 8-13-87; Hrg. on defts' and Intervenor's Mtns' to Amend Findings of Fact and to Subst. Letter of Credit for Bond. If Pltf. has any objs. to mtns. to be filed by 8-20-87 at 5:00 (AJM) dktd. 8-13-87.
8-13-87	122	Pltf's Opo. to Supple Mtn. to Amend Findings of Fact and Conclusions of Law., for New Trial and To Dism.
8/13/87	123	Pltf's mtn to cont hrg on mtn to amend Findings of Fact & Conclusions of Law, for New Trial & to Dismiss & ORDERED that same be cont to 9/9/87 at 9:00 a.m. (AJM) 8/14/87 dktd 8-17-87.
8-18-87	124	*Ntc. of Appeal* by C.T. Carden and Leonard Limes of judgment entered on 7-29-87.
8-19-87	XX	Ntc of Appeal forwarded to all parties. (JMD)

DATE	NR.	PROCEEDINGS
9-10-87	125	M.E. 9-9-87; ORDERED that Pltf's Mtn. to Amend judg. is GRATNED; (sic) FURHTER (sic) ORDERED that counsel for pltf. prepare a proposed amended judg. and subm. to ct. by 9-17-87. ORDERED that Defts' and Intervenors' Mtn. to Amend Findings for New Trial and to Dism are DENIED; ORDERED that defts' and Intervenors Mtn. to Subst. Letter of Credit for Bond is GRANTED. (AJM) dktd. 9-10-87.
9-9-87	126	Pltf's Transcript Order of proceedings held on May 20-21, 87.
9/14/87	xx	Record forwarded to Court of Appeals. (dlm)
10-7-87	127	Letter dated 10-7-87 to Clerk from Richard Ingolia in re: letter of credit.
10-7-87	128	Jnt. Mtn. & ORDERED that the orig. letter of credit is approved and to be del. to Clerk's office for safekeeping til (sic) further orders of Ct. (AJM) 10-9-87 dktd. 10-8-87.
9-17-86	126a	JUDGMENT: ORDERED in favor of pltf. and agsnt. (sic) defts', Carden and Limes for $467,806.25 plus all addit'l atty's fees incurred after 4-30-87; In favor of Arkoma, Hepburn, Qualls, Ledbetter and Merkel dism the counterclaim filed by Carden and Limes w/ prej. at their costs; In favor of Arkoma, Hepburn, Qualls, Ledbetter and Merkel dism. the intervention and counterclaim filed by Magee w/ prej at its costs. (AJM) 9-17-87 dktd. 10-23-87.
10/27/87	XXX	Doc No. 126a fwd. to Ct. of Appeal (PNC)

DATE	NR.	PROCEEDINGS
12-8-87	129	Mtn. of Leonard Limes and C.T. Carden & ORDERED that an Exped. Hrg. is set for 12-16-87 at 9:00 on Mtn. for leave to file Ntc. of Appeal. (AJM) 12-10-87 dktd. 12-10-87.
12-10-87	130	Mtn. of C.T. Carden and Leonard Limes for Leave to ifle (sic) Ntc. of Appeal.
12-15-87	131	Pltf's Memo. in Opo. to Mtn. for leave to file Ntc. of Appeal.
12-16-87	132	Memo of C. T. Carden, Leonard L. Limes & Magee Drilling Co. in response to pltf's opp to mtn for leave to file ntc of appeal.
12-17-87	133	M.E. 12-16-87: ORDERED that time for defts to file a ntc of appeal of judg is EXTENDED to 10 days from date of entry of this order. (AJM) dktd 12-17-87.
12-18-87	134	Ntc. of Appeal of C.T. Carden and Leonard Limes of judg. entered on 10-23-87 pursuant to leave granted on 12-16-87.
12/18/87	xx	Notice of Appeal forwarded to all parties. (dlm)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES, Plaintiff	*	CIVIL ACTION
	*	NO: 85-2295
VERSUS	*	SECTION "D" MAG. 4
C. TOM CARDEN AND LEONARD L. LIMES, Defendants	*	

* * * * * * * * * * * *

COMPLAINT

The complaint of Arkoma Associates, an Arizona limited partnership appearing herein by and through DAVID A. HEPBURN a general partner, respectfully avers:

1.

The defendants are C. Tom Carden, an individual of the full age of majority and resident of the Parish of Orleans, State of Louisiana and Leonard L. Limes, an individual of the full age of majority and resident of the Parish of Jefferson, State of Louisiana.

2.

Jurisdiction is founded on diversity of citizenship as provided in 28 U.S.C. §1332. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

3.

On June 27, 1984, Arkoma Associates and McGee Drilling Company executed an equipment lease in the form annexed hereto as Exhibit "A".

4.

Defendants Carden and Limes and Don McGee executed a guarantee agreement guaranteeing all obligations of McGee Drilling Company under the aforesaid lease agreement in the form annexed hereto as Exhibit "B".

5.

On or about January 16, 1985, McGee Drilling Company tendered back to Arkoma Associates the drilling rigs under lease.

6.

Defendants Carden and Limes were put on notice of the default by McGee Drilling Company for non-payment of rent for the quarter commencing February 1, 1985 by letter dated February 18, 1985, a copy of which is annexed hereto as Exhibit "C".

7.

Defendants failed to cure said default.

8.

As a result of this default, defendants Carden and Limes are indebted to plaintiff for the following amounts.

a). Accelerated Rent	$ 432,000.00
b). Drill pipe and equipment Replacement	$ 63,000.00
c). Storage charges (Estimate)	$ 10,000.00
d). Attorneys fees (Estimate)	$ 50,000.00
e). Costs (Estimate)	$ 5,000.00
TOTAL	$ 560,000.00

WHEREFORE, plaintiff demands judgment against defendants for the sum of FIVE HUNDRED AND SIXTY THOUSAND AND NO/100 ($560,000.00) DOLLARS plus legal interest thereon from date of judicial demand and all costs of these proceedings.

Respectfully Submitted:

McCLOSKEY, DENNERY, PAGE & HENNESY

By: /s/ Mitchell J. Hoffman
Mitchell J. Hoffman
4040 One Shell Square
New Orleans, LA 70139
(504) 586-1323
Attorneys for Plaintiffs

PLEASE SERVE:

C. TOM CARDEN
1717 Oriole Street
New Orleans, LA 70122
LEONARD L. LIMES
3621 Clifford Street
Metairie, LA 70002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	:	CIVIL ACTION NO. 85-2295
VERSUS	:	SECTION "D" Mag. 4
C. TOM CARDEN	:	ANSWER AND
LEONARD L. LIMES	:	COUNTERCLAIM

DEFENSE

1.

Defendants admit the allegations contained in Paragraph 1.

2.

Defendants admit the allegations contained in Paragraph 2.

3.

Defendants denies the allegation contained in Paragraph 3 and contends that this contract was amended on the 18th day of July, 1984. A copy of which is annexed hereto as Exhibit "A".

4.

Defendants denied the allegation contained in Paragraph 4.

5.

Defendants admit the allegation contained in Paragraph 5.

6.

Defendants denies the allegation contained in Paragraph 6.

7.

Defendants denies the allegation contained in Paragraph 7.

8.

Defendants denies the allegation contained in Paragraph 8.

COUNTERCLAIM

As their counterclaim against Arkoma Associates, defendants allege:

1.

Jurisdiction is founded on diversity of citizenship as provided in 28 U.S.C. 1332. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

2.

On June 27, 1984, Magee Drilling Company, A Texas Corporation executed a contract with Arkoma Associates, presumably a Limited Partnership, represented by Richard Ledbetter, presumably a general partner, acting on behalf of other general partners, David A. Hepburn, Eldon Qualls and Dudley B. Merkel.

3.

The terms of the lease contained a provision requiring a written joint inventory to be signed by Lessor and Lessee before the release of the equipment by the Lessor to the Lessee.

4.

The inventory was performed in Oklahoma City, by Don Magee, President of Magee Drilling Company, as the rigs were awaiting shipment to South Texas. Much of the equipment was missing, a copy of which is annexed to Exhibit "A", initialed by Arkoma and Magee Drilling Co. Hidden from view of the inspection was blantant (sic) sabotage.

5.

The reliance on the representations of Arkoma and other individuals that the rigs were completely outfitted and ready for use cause many delays and forced heavy losses as a result of this misrepresentation.

6.

Eventually the loss multiplied and forced Magee Drilling Company to go out of business and tendered the rigs back to the Lessor in accordance with the lease.

7.

As a result of plaintiff misrepresentation the Magee Drilling Company had a loss of $676,172.00 in 1984.

8.

This loss in 1984 could not be overcome in the early party (sic) of 1985 and the officers were forced to meet

with the representatives of Arkoma Associates to discuss a suitable compromise of the rigs rentals.

9.

Without any solution to the problems facing Magee Drilling Company the company continued to lose money and the investment of defendants were lost and now the guaranty of Limes and Carden are called upon to make whole the carelessness and neglectfulness of Arkoma Associates.

10.

The defendants were not privy to the negotiation and there were exchanges of information which could have been supportive of misrepresentation, fraud and injurious reliance and these Facts are known to the plaintiff and Magee Drilling Company and the defendants must rely upon discovery to develop its defense.

11.

The defendants have reason to believe that certain individuals as well as the plaintiff may have engaged in a conspiracy to defraud the defendants herein, such information being solely in the knowledge of the plaintiff and other individuals and that discovery is necessary to protect the interest of defendants.

12.

The defendant reserve its right to amend and add to its answer and counter claim to include any allegation which may prove pertinent in its discovery:

1) That plaintiff takes nothing by his its (sic) claim:

2) That defendant have judgment against plaintiff in the amount $999,272.00.

3) That defendant be awarded cost herein:

4) That defendant be awarded reasonable attorney fees.

5) That the court grant such other and further relief as the court may deem proper.

Dated July 12, 1985

Respectfully submitted,

Joseph M. Perry, Jr.
3850 N. Causeway Blvd. Su.1111
Metairie, La. 70002
(504) 831-9951
Attorney for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO: 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	MAG. DIV. 4

* * * * * * * * * * * * *

ANSWER TO COUNTER-CLAIM

NOW COMES Arkoma Associates, an Arizona Limited Partnership, and for answer to the counter-claim filed herein respectfully avers:

FIRST DEFENSE

The counter-claim fails to state a claim against plaintiff upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter of the counter-claim.

THIRD DEFENSE

AND NOW, for answer to the individual allegations of the counter-claim, plaintiff, Arkoma Associates, respectfully avers:

I.

The allegations of paragraph 1 are denied.

II.

A lease contract was entered into on June 27, 1984 by and between Magee Drilling Company and Arkoma Associates. The lease contract is a written document and is the best evidence of its contents.

III.

The allegations of paragraph 3 are denied. The lease contract referred to therein is a written document and is therefore the best evidence of its contents.

The allegations of paragraph 4 are denied.

IV.

The allegations of paragraphs 4, 5, 6, 7, 8, 9, 10, 11, and 12 are denied.

WHEREFORE, Arkoma Associates prays that this answer to counter-claim be deemed good and sufficient and that the counter-claim filed herein be dismissed at defendant's cost.

LEMLE, KELLEHER, KOHLMEYER,
DENNERY HUNLEY, MOSS & FRILOT

By: /s/ Mitchell J. Hoffman
Mitchell J. Hoffman, T.A.
4040 One Shell Square
New Orleans, LA 70139
(504) 586-1323

Attorneys for
Arkoma Associates

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN, LEONARD L. LIMES	*	SECTION "D", MAG. 4

* * * * * * * * * * * * *

AMENDED ANSWER AND COUNTERCLAIM

The amended answer and counterclaim of defendants, C. T. Carden and Leonard L. Limes (hereafter collectively "Defendants"), respectfully represents that they desire to amend their original answer and counterclaim in the following particulars:

I.

By substituting for paragraphs "1" through "8" of the Answer or Defense, the following:

I.

FIRST DEFENSE

The complaint fails to state a claim against the Defendants upon which relief can be granted.

II.

SECOND DEFENSE

Answering categorically the numbered paragraphs of Plaintiff's complaint, Defendants show:

A) The allegations of Paragraph 1 are admitted;

B) The allegations of Paragraph 2 are denied;

C) The allegations of Paragraph 3 are denied, except to admit that Plaintiff and Magee Drilling Company (hereafter "Magee") executed a document styled "equipment lease" dated June 27, 1984 which was amended July 18, 1984 by an instrument attached to Defendants' original answer as Exhibit "A" (hereafter "Lease");

D) The allegations of Paragraph 4 are denied except to admit that Defendants executed a guaranty agreement which is a written document, the content of which is the best evidence of the guaranty, all allegations in conflict therewith being denied;

E) The allegations of Paragraph 5 are admitted;

F) The allegations of Paragraph 6 are denied except to admit that Defendants received a letter dated February 18, 1985 from James D. Veselich, attorney at law, purporting to notify them of an alleged default by Magee under the terms of the Lease, and acknowledging acceptance of possession of the equipment which was the subject of the Leases (hereafter "Equipment") by Plaintiff and the receipt of all rental due in connection therewith through the date of repossession;

G) The allegations of Paragraph 7 are denied; and

H) The allegations of Paragraph 8 are denied.

III.

THIRD DEFENSE

Further answering, Defendants show:

A) The Lease is void and Plaintiff's claim unenforceable for the following reasons:

1) The Plaintiff failed to deliver the Equipment, to such an extent as to constitute:

a) Fraud in the execution of the Lease or *fraud in the factum;* and

b) Failure or partial failure of consideration;

2) To the extent that the Lease provides that Plaintiff may regain possession of the Equipment and yet hold Magee and Defendants liable for rental accruing thereafter, the Lease is unconscionable;

3) Those provisions in the Lease calling for the payment of future rental after Plaintiff's repossession of the Equipment constitute an unlawful penalty clause;

4) Plaintiff, Defendants, and Magee repudiated and/or voluntarily terminated the Lease at the time Plaintiff accepted delivery of the Equipment from Magee;

5) By accepting delivery of the Equipment from Magee, Plaintiff:

a) Elected its remedy of Lease cancellation; and

b) Is now estopped to claim enforcement of the Lease;

6) There was no meeting of the minds of Plaintiff, Defendants, and Magee as to the quantity or quality of the Equipment; and

7) Plaintiff failed to minimize any damages which it has sustained.

B) Magee paid all rental due under the Lease until such time as Plaintiff accepted possession of the Equipment from Magee;

C) In the event that this Court finds Defendants to be indebted to Plaintiff for any sums whatsoever, Defendants are entitled to setoff against any such sums all sums for which Plaintiff is indebted to Defendants, as hereinafter alleged, and all sums for which Plaintiff is indebted to Magee;

D) Plaintiff and Magee amended the Lease without the consent of Defendants thereby releasing Defendants from their guaranty of Magee's obligations under the Lease.

II.

By substituting for paragraphs "1" through "12" of the Counterclaim, the following:

I.

The following are made defendants in this counterclaim:

A) Arkoma Associates (hereafter "Arkoma"), a partnership organized under the laws of the State of Arizona;

B) David A. Hepburn (hereafter "Hepburn"), domiciled in the State of Arizona;

C) Eldon Qualls (hereafter "Qualls"), domiciled in the State of Oklahoma;

D) Richard K. Ledbetter (hereafter "Ledbetter"), domiciled in the State of Oklahoma; and

E) Dudley B. Merkel (hereafter "Merkel"), domiciled in the State of Arizona.

II.

On information and belief, it is alleged that Hepburn, Qualls, Ledbetter, and Merkel (hereafter collectively "Partners") are the general partners of Arkoma and, as such, liable, jointly, severally and *in solido,* with Arkoma for the obligations of Arkoma.

III.

Arkoma, through the Partners, its agents, employees, and/or officers represented to Magee Drilling Company (hereafter "Magee") C. T. Carden and Leonard L. Limes (hereafter "Carden/Limes") that the equipment to be leased (hereafter "Equipment") by Arkoma to Magee would be be (sic) fully outfitted and ready for use and capable of drilling to a depth of 7,500 feet (hereafter collectively "Representations") when, in fact, it was not (hereafter collectively "Deficiencies").

IV.

The Deficiencies were non-apparent to Magee and Carden/Limes or hidden from their view by Arkoma

and/or its Partners, agents, employees, and/or officers, but were well known to Arkoma and/or its Partners, agents, employees, and/or officers.

V.

Magee and Carden/Limes relied upon the Representations in investing their individual funds (hereafter "Investment") in Magee and in entering into the lease agreement and guaranty of June 27, 1984.

VI.

As a result of the Deficiencies, the Equipment could not be used, which resulted in the financial collapse of Magee and the loss of the Investment by Carden/Limes.

VII.

The Investment amounts to a sum in excess of $750,000.00 for which Arkoma and the Partners are liable, jointly, severally, and *in solido.*

WHEREFORE, Defendants, C. T. Carden and Leonard L. Limes, pray for judgment:

1. On the main demand in their favor and against the plaintiff, Arkoma Associates, rejecting its demands with prejudice at its cost, and

2. On the counterclaim, in their favor and against the defendants in counterclaim, Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido,* in the full and true sum of $750,000.00 together with legal

interest thereon from date of judicial demand until paid, and for all costs of these proceedings.

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for C. T. Carden and Leonard L. Limes
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703

By: /s/ Richard K. Ingolia
Richard K. Ingolia

JOSEPH M. PERRY, JR.
Co Counsel or C. T. Carden and Leonard L. Limes
3850 North Causeway Boulevard
Metairie, LA 70002
Telephone: 504/831-9951

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION NO. 85-2295
VERSUS	*	
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION D, MAG.4
MAGEE DRILLING COMPANY, INTERVENOR	*	

* * * * * * * * * * * * *

INTERVENOR'S ANSWER AND COUNTERCLAIM

Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, responds to the complaint of Arkoma Associates (hereafter "Plaintiff"), as follows:

I.

FIRST DEFENSE

The complaint fails to state a claim against Magee upon which relief can be granted.

II.

SECOND DEFENSE

Answering categorically the numbered paragraphs of Plaintiff's complaint, Magee shows:

A) The allegations of Paragraph 1 are admitted;

B) The allegations of Paragraph 2 are denied;

C) The allegations of Paragraph 3 are denied, except to admit that Plaintiff and Magee executed a document styled "equipment lease" dated June 27, 1984 which was amended July 18, 1984 by an instrument attached to the original answer of C.T. Carden and Leonard L. Limes (hereafter "Carden/Limes") as Exhibit "A" hereafter "Lease");

D) The allegations of Paragraph 4 are denied except to admit that Carden/Limes executed a guaranty agreement which is a written document, the content of which is the best evidence of the guaranty, all allegations in conflict therewith being denied;

E) The allegations of Paragraph 5 are admitted;

F) The allegations of Paragraph 6 are denied except to admit that Carden/Limes received a letter dated February 18, 1985 from James D. Veselich, attorney at law, purporting to notify them of an alleged default by Magee under the terms of the Lease, and acknowledging acceptance of the possession of the equipment which was the subject of the Lease (hereafter "Equipment") by Plaintiff and the receipt of all rental due in connection therewith through the date of repossession;

G) The allegations of Paragraph 7 are denied; and

H) The allegations of Paragraph 8 are denied.

III.

THIRD DEFENSE

Further answering, Defendants show:

A) The Lease is void and Plaintiff's claim unenforceable for the following reasons:

1) The Plaintiff failed to deliver the Equipment, to such an extent as to constitute:

a) Fraud in the execution of the Lease or *fraud in the factum;* and

b) Failure of partial failure of consideration;

2) To the extent that the Lease provides that Plaintiff may regain possession of the Equipment and yet hold Magee and Defendants liable for rental accruing thereafter, the Lease is unconscionable;

3) Those provisions in the Lease calling for the payment of future rental following Plaintiff's repossession of the Equipment constitute an unlawful penalty clause;

4) Plaintiff, Carden/Limes, and Magee repudiated and/or voluntarily terminated the Lease at the time Plaintiff accepted delivery of the Equipment from Magee;

5) By accepting delivery of the Equipment from Magee, Plaintiff:

a) Elected its remedy of Lease cancellation; and

b) Is now estopped to claim enforcement of the Lease;

6) There was no meeting of the minds of Plaintiff, Defendants, and Magee as to the quantity or quality of the Equipment; and

7) Plaintiff failed to minimize any damages which it has sustained;

B) Magee paid all rental due under the Lease until such time as Plaintiff accepted possession of the Equipment from Magee;

C) In the event that this Court finds Magee to be indebted to Plaintiff for any sums whatsoever, Magee is entitled to setoff against any such sums all sums for which Plaintiff is indebted to Magee, as hereinafter alleged.

IV.

COUNTERCLAIM

Now, assuming the position of counterclaimant, Magee, with respect represents:

A) The following are made defendants in this counterclaim:

1) Arkoma Associates (hereafter "Arkoma"), a partnership organized under the laws of the state of Arizona;

2) David A. Hepburn (hereafter "Hepburn"), domiciled in the State of Arizona;

3) Eldon Qualls (hereafter "Qualls"), domiciled in the State of Oklahoma;

4) Richard K. Ledbetter (hereafter "Ledbetter") domiciled in the State of Oklahoma;

5) Dudley B. Merkel (hereafter "Merkel"), domiciled in the State of Arizona; and

B) On information and belief, it is alleged that Hepburn, Qualls, Ledbetter, and Merkel (hereafter collectively "Partners") are designated as the general partners of Arkoma and, as such, liable, jointly, severally and *in solido*, with Arkoma for the obligations of Arkoma.

C) Arkoma, through the Partners, its agents, employees, and/or officers represented to Magee and Carden/Limes that the Equipment leased by Arkoma to Magee would be be (sic) fully outfitted, ready for use, and capable of drilling to a depth of 7,500 feet (hereafter collectively "Representations") when, in fact, it was not (hereafter collectively "Deficiencies").

D) The Deficiencies were non-apparent to Magee and Carden/Limes or hidden from their view by Arkoma and/or its Partners, agents, employees, and/or officers, but were well known to Arkoma and/or its Partners, agents, employees, and/or officers.

E) Magee and Carden/Limes relied upon the Representations in entering into the Lease.

F) As a result of the Deficiencies, the Equipment could not be used, which resulted in the financial collapse of Magee and the loss of work and revenues amounting to approximately $1,000,000.00.

G) In an effort to render the Equipment usable as represented, Magee expended approximately $500,000.00, to no avail, for which it is entitled to recover of Arkoma.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the costs of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Co., and against Arkoma Associates, David A. Hepburn,

Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the full and true sum of $1,500,000.00 together with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

BERKE & INGOLIA
A PROFESSIONAL LAW
CORPORATION
Co-Counsel for Magee Drilling
Company
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1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703
By: /s/ Richard K. Ingolia
Richard K. Ingolia

JOSEPH M. PERRY
Co-Counsel for Magee Drilling
Company
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Telephone: 504/831-9951

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	MAG. DIV. 4

* * * * * * * * * * * * *

DEFENDANTS' AMENDED ANSWER AND COUNTERCLAIM

The amended answer and counterclaim of defendants, C. T. Carden and Leonard L. Limes (hereafter collectively "Defendants"), respectfully represents that they desire to amend their first amended answer in the following particulars:

I.

By adding the following additional defense:

IV.

FOURTH DEFENSE

Further answering, Defendants show:

A) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's untrue assertions that the Equipment was of a quality sufficient to execute the work for which it was intended; and

B) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's failure to disclose the true quality of the Equipment.

II.

By adding the following paragraphs to the counterclaim:

VIII.

The conduct of Arkoma and the Partners disclose a conscious indifference to the rights of Defendants rendering Arkoma and the Partners liable to Defendants for exemplary and punitive damages.

WHEREFORE, Defendants, C. T. Carden and Leonard L. Limes, pray for judgment:

1. On the main demand in their favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the cost of Arkoma Associates, and

2. On the counterclaim:

A) In their favor and against defendants in counterclaim, Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally and *in solido*, in the full and true sums of $750,000.00 as compensatory damages and $1,000,000.00 as exemplary and punitive damages together with legal interest thereon from date of judicial demand until paid, and for all costs of these proceedings.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
	*	SECTION "D"
C. TOM CARDEN AND LEONARD L. LIMES	*	MAG. DIV. 4

* * * * * * * * * * * *

INTERVENOR'S AMENDED ANSWER AND COUNTERCLAIM

The amended answer and counterclaim of Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, respectfully represents that it desires to amend its original answer and counterclaim in the following particulars:

I.

By adding the following additional defense:

IV

FOURTH DEFENSE

Further answering, Magee shows:

A) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's untrue assertions that the Equipment was of a quality sufficient to execute the work for which it was intended; and

B) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's failure to disclose the true quality of the Equipment.

II.

By adding the following paragraphs to the counterclaim:

H) The conduct of Arkoma and the Partners disclose a conscious indifference to the rights of Magee rendering Arkoma and the Partners liable to Magee for exemplary and punitive damages.

I) The facts alleged as set out in paragraphs C, D and E are violations of the Texas Deceptive Trade Practices And Consumer Protection Act rendering Arkoma and the Partners liable to Magee for triple damages.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the cost of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Company, and against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the following amounts:

1. $1,500,000.00 compensatory damages;

2. $1,000,000.00 exemplary and punitive damages; and

3. $4,500,000.00 triple damages;

together with reasonable attorney fees and legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

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By: /s/ Richard K. Ingolia
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(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO: 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D", MAG. DIV. 4

* * * * * * * * * * * *

PLAINTIFF'S ANSWER TO DEFENDANTS' AMENDED ANSWER AND COUNTERCLAIM

NOW INTO COURT, through its undersigned counsel, comes plaintiff Arkoma Associates, and in answer to defendants' Amended Answer and Counterclaim denies each and every allegation contained therein except as may be hereinafter specifically admitted. Plaintiff answers defendants' amended counterclaim as follows:

I.

Plaintiff admits this Court has jurisdiction over the limited partnership of Arkoma Associates (hereinafter "Arkoma"), but asserts that the court does not have jurisdiction over the individuals, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel (hereinafter "the General Partners"), and that they have not previously been parties to this action and therefore cannot be made defendants to this counterclaim.

II.

Plaintiff admits that the General Partners are general partners of Arkoma. Whether they are liable in any way

for the obligations of Arkoma is a question of law which need not be answered.

III.

Plaintiff denies that it made representations to defendants or Magee as alleged in Paragraph 3 of defendants' amended counterclaim, and further denies that the equipment to be leased was deficient as alleged by defendants.

IV.

Plaintiff denies that there were any deficiencies as alleged by defendants in Paragraph 4 of their amended counterclaim. Plaintiff alleges in the alternative, if there were such deficiencies, they were not known to exist by plaintiff and were not hidden by plaintiff and/or its partners, agents, employees, or officers.

V.

Plaintiff denies that it made such representations as alleged by defendants in Paragraph 5 of their amended counterclaim. Plaintiff lacks sufficient knowledge or information to form a belief in the remaining allegations contained in Paragraph 5, and therefore denies them.

VI.

Plaintiff denies there were any such deficiencies as alleged by defendants in Paragraph 6 of their amended counterclaim. Alternatively, plaintiff alleges that if there were such deficiencies, they did not prevent the use of

the equipment or result in the financial collapse of Magee or loss of investment by defendants.

VII.

Plaintiff denies that the General Partners or plaintiff are liable to defendants for any amount. Plaintiff lacks sufficient knowledge or information to form a belief in the amounts of any investment by defendants or others in Magee Drilling Company upon which to admit allegations as to the amount, and therefore denies defendants or Magee made investment in excess of $750,000 in Magee Drilling Company as alleged in Paragraph 7 of defendant's amended counterclaim.

FIRST AFFIRMATIVE DEFENSE

Plaintiff asserts as a first affirmative defense to defendants' Amended Answer and Counterclaim that the claims asserted against plaintiff therein are barred by the applicable statutes of limitation.

SECOND AFFIRMATIVE DEFENSE

Plaintiff asserts as a second affirmative defense to defendants' Amended Answer and Counterclaim that defendants' have waived the right, contractually and otherwise, to assert the claims made against plaintiff therein.

THIRD AFFIRMATIVE DEFENSE

Plaintiff asserts as a third affirmative defense to defendants' Amended Answer and Counterclaim that

defendants are estopped, contractually and otherwise, from asserting the claims made against plaintiff therein.

WHEREFORE, plaintiff Arkoma Associates, prays that defendants take nothing by their Amended Answer and Counterclaim and that the same be dismissed with prejudice, for costs and legal fees of defending that Counterclaim, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

By: /s/ D. van Ausdall
Mitchell J. Hoffman
Dirk van Ausdall
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(504) 586-1241
Attorneys for Arkoma Associates

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO: 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION: "D"
	*	MAG. DIV. 4

* * * * * * * * * * * *

PLAINTIFF'S ANSWER TO INTERVENOR'S ANSWER AND COUNTERCLAIM

NOW INTO COURT, through its undersigned counsel, comes plaintiff Arkoma Associates (hereafter "Arkoma"), and in answer to intervenor Magee Drilling Company's (hereinafter "Magee") Answer and Counterclaim denies each and every allegation contained therein except as may be hereinafter specifically admitted. Plaintiff answers intervenor's Counterclaim as follows:

A.

Plaintiff admits this Court has jurisdiction over the limited partnership of Arkoma Associates, but asserts that the Court does not have jurisdiction over the individuals, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel (hereinafter "the General Partners"), and that they have not previously been parties to this action and cannot be made defendants to this counterclaim.

B.

Plaintiff admits that the General Partners are general partners of Arkoma. Whether they are liable in any way

for the obligations of Arkoma is a question of law which need not be answered.

C.

Plaintiff denies that it made representations to defendants or Magee as alleged in Paragraph C of intervenor Magee's Counterclaim, and further denies that the equipment to be leased was deficient as alleged by intervenor.

D.

Plaintiff denies that there were any deficiencies as alleged by intervenor Magee in Paragraph D of its Counterclaim. Plaintiff alleges in the alternative that if there were such deficiencies, they were not known to exist and were not hidden by plaintiff and/or its partners, agents, employees, of officers.

E.

Plaintiff denies that it made representations as alleged by intervenor Magee in Paragraph E of its Counterclaim. Plaintiff lacks sufficient knowledge or information to form a belief in the remaining allegations contained in Paragraph E, and therefore denies them.

F.

Plaintiff denies there were any such deficiencies as alleged by intervenor Magee in Paragraph F of its Counterclaim. Alternatively, plaintiff alleges that if there were such deficiencies, they did not prevent the use of the

equipment or cause the financial collapse of Magee or loss or (sic) revenues.

G.

Plaintiff denies that intervenor Magee had to expend approximately $500,000 to render the equipment usable. Alternatively, plaintiff denies that intervenor Magee is entitled to recover any such expenditures made to make the equipment usable.

FIRST AFFIRMATIVE DEFENSE

Plaintiff asserts as a first affirmative defense to intervenor's Answer and Counterclaim that the claims asserted against plaintiff therein are barred by the applicable statutes of limitation.

SECOND AFFIRMATIVE DEFENSE

Plaintiff asserts as a second affirmative defense to intervenor's Answer and Counterclaim that intervenor has waived, contractually and otherwise, the right to assert the claims made against plaintiff therein.

THIRD AFFIRMATIVE DEFENSE

Plaintiff asserts as a third affirmative defense to intervenor's Answer and Counterclaim that intervenor is estopped, contractually and otherwise, from asserting the claims made against plaintiff therein.

WHEREFORE, plaintiff, Arkoma Associates, prays that intervenor Magee take nothing by its Counterclaim

and that the same be dismissed with prejudice, for costs and legal fees of defending that Counterclaim, and for such other and further relief as this Court may deem just and proper.

Dated September 23, 1986.

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

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Attorneys for Arkoma Associates

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN, LEONARD L. LIMES, and MAGEE DRILLING COMPANY	*	SECTION "D", MAG. (4)

* * * * * * * * * * * *

ANSWER TO COUNTERCLAIM

In answer to the counterclaim of defendants C. Tom Carden and Leonard L. Limes, plaintiff, Arkoma Associates, and the general partners of Arkoma Associates, David A. Hepburn, Eldon E. Qualls, Richard K. Ledbetter, and Dudley B. Merkel (hereinafter "counterclaim defendants") respectfully respond as follows:

FIRST DEFENSE

The counterclaim fails to state a claim against counterclaim defendants upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter of the counterclaim.

THIRD DEFENSE

AND NOW, for answer to the individual allegations of the counterclaim, counterclaim defendants respectfully aver:

1.

The allegations of paragraph I of the counterclaim are admitted.

2.

It is admitted that David A. Hepburn, Eldon E. Qualls, Richard K. Ledbetter, and Dudley B. Merkel are the general partners of Arkoma Associates. The remaining allegations of paragraph II are denied.

3.

The allegations of paragraphs III, IV, VI, VII, and VIII are denied.

4.

Counterclaim defendants lack sufficient knowledge or information upon which to admit or deny the allegations of paragraph V, and on that basis deny the allegations contained therein.

WHEREFORE, counterclaim defendants pray that this Answer to Counterclaim be deemed good and sufficient and that the counterclaim filed herein be dismissed at defendants' cost.

LEMLE, KELLEHER,
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HUNLEY, MOSS & FRILOT
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Attorneys for Arkoma Associates, David A. Hepburn, Eldon E. Qualls, Richard K. Ledbetter, and Dudley B. Merkel

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
* * * * * * * * * * * *	*	MAG. DIV. 4

STIPULATION

IT IS HEREBY agreed and stipulated by and among Arkoma Associates, plaintiff, C. T. Carden and Leonard L. Limes, Defendants, each through undersigned counsel:

1) Arkoma Associates is alleged to be a limited partnership under the laws of the State of Arizona.

2) One of the alleged limited partners is a citizen of Louisiana for the purposes of jurisdiction based on diversity of citizenship.

3) The alleged general partners of Arkoma Associates and the states of their citizenship are as follows:

David Hepburn	-	Arizona
Dudley Merkel	-	Arizona
Richard Ledbetter	-	Oklahoma
Eldon Qualls	-	Oklahoma

4) This stipulation is in lieu of a formal amendment to the complaint insofar as it identifies the names and domiciles of the general partners.

Respectfully Submitted:

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

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Attorneys for C. T. Carden and Leonard L. Limes and Magee Drilling Company

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
* * * * * * * * * * * *	*	MAG. DIV. 4

MOTION TO DISMISS FOR LACK OF JURISDICTION

C. T. Carden and Leonard L. Limes, defendants, move the Court to dismiss this action for lack of jurisdiction.

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By: /s/ Richard K. Ingolia
Richard K. Ingolia

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(Certificate of Service omitted in printing)

MINUTE ENTRY
McNAMARA, J.
April 23, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
	*	SECTION "D"
C. TOM CARDEN, ET AL	*	(Filed April 23, 1989)

Before the court is the Motion of Defendants, C. Tom Carden and Leonard L. Limes, to Dismiss Plaintiff's action for Lack of Jurisdiction. The Motion was heard during a Pre-Trial Conference held in this matter on February 26, 1986. Counsel were ultimately given until April 4, 1986 to submit additional memoranda regarding the jurisdictional issue, with the matter being taken under advisement as of April 4, 1986.

Having considered the memoranda and argument of counsel and the applicable law, the court makes the following findings. There are essentially two arguments presented by Defendants in support of their Motion to Dismiss. First, Defendants argue that because Plaintiff, Arkoma Associates, is a general partnership rather than a limited partnership, in order to obtain diversity jurisdiction the citizenship of each and every one of the partners must be diverse from the citizenship of each Defendant. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456, 20 S.Ct. 690, 693, 44 L.Ed. 842, 845 (1900). Since one

of the partners is a citizen of the same state as Defendants[1], diversity does not exist; therefore, the suit should be dismissed for lack of jurisdiction.

The Court is unpersuaded by this argument. Pursuant to Section 29-302B of the Arizona Revised Statutes, the law which was in effect when Arkoma Associates was formed, a limited partnership is valid if there has been "substantial compliance in good faith" with Section 29-302A of the Arizona Revised Statutes. While Plaintiff did not comply with all the requirements of Section 29-302A[2], the court finds that the Plaintiff, in good faith,

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[1] Both of the Defendants are citizens of Louisiana and the parties have stipulated to the fact that one of Plaintiff's alleged limited partners is also a citizen of Louisiana.

[2] Section 29-302A of the Arizona Revised Statutes states, in pertinent part:

A. Two or more persons desiring to form a limited partnership shall:

1. Sign and acknowledge a certificate, which shall state:

. . .

(d) The name and place of residence of each member, general *and limited partners being respectively designated*. . . .

2. File for record the certificate in the office of the county recorder of the county in which the principal place of business is situated. [emphasis provided.]

Plaintiff failed to comply with this portion of A.R.S. § 29-302A in that Plaintiff did not state the name and place of residence of each of its limited partners in its original limited partnership certificate which was filed on September 1, 1981 with the recorder's office in Maricopa County, the county where Plaintiff's principal place of business is located.

substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law.

Second, Defendants argue that even if Plaintiff is a limited partnership, diversity jurisdiction still does not exist since one must look to the citizenship of both general and limited partners for the purpose of determining whether of not complete diversity is present. If this is the case, then diversity jurisdiction is not present in this action since, as stated earlier, one of the limited partners is a citizen of the same state as Defendants. *See supra* n. 1.

While I am aware that the Third and Seventh Circuits support Defendants' position[3], I feel bound to uphold jurisdiction in this instance for the following reason. In *Lee v. Navarro Savings Association*, 597 F.2d 421 (5th Cir. 1979), the Fifth Circuit indirectly addressed the issue concerning whether or not the citizenship of limited partners is of any significance in determining if a federal court's diversity jurisdiction may be invoked. While *Lee* dealt with a business trust rather than a limited partnership, the court, by analogizing a business trust to a limited partnership, gave its view regarding the importance of a limited partner's citizenship for diversity purposes. The court reasoned:

> The trust here is analogous to a limited partnership and the citizenship of its beneficiary shareholders

---

[3] *See Carlsberg Resources Corp. v. Cambria Savings and Loan Assn.*, 554 F.2d 1254 (3rd Cir. 1977), and *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984), for the views of the Third and Seventh Circuits, respectively, on this particular diversity question.

> should not be counted in determining the existence of diversity jurisdiction. The citizenship of the shareholder should be disregarded in the same manner as was done by the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 184 (2nd Cir. 1966), *cert. denied*, 385 U.S. 817 (1966), where the court held that 'a suit brought against a New York [limited] partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity.' [footnote omitted.] *Lee* at 425.

In light of this language and in the absence of any Supreme Court authority to the contrary[4], I am compelled by Fifth Circuit precedent to hold that diversity jurisdiction does exist in this matter; accordingly, Defendants' Motion to Dismiss Plaintiff's suit for lack of jurisdiction is DENIED. However, because I find that my order denying Defendants' Motion to Dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

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[4] The Supreme Court reviewed the *Lee* opinion in *Navarro Savings Association v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). While the Supreme Court ultimately affirmed the Fifth Circuit's holding in *Lee*, Defendants argue that in doing so, the Court rejected the appellate court's reasoning regarding whether or not the citizenship of limited partners should be considered in determining if a federal court has diversity jurisdiction over a particular action. However, I am unpersuaded by Defendants' argument and note the dissent of Justice Blackmun who "read[s] the court's opinion in [*Navarro*] as expressing no view on the diversity or citizenship issue that is presented when one of the parties is a limited partnership." *Id.* at 1789 n. 6 (Blackmun, J. dissenting).

from the order may materially advance the ultimate termination of the litigation, the court hereby certifies this matter for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-9201

USDA #CA 85-2295 D

ARKOMA ASSOCIATES,

Plaintiff-Respondent,

versus

C. TOM CARDEN and LEONARD L. LIMES,

Defendants-Petitioners.

- - - - - - - - - - -

Petition for Leave to Appeal an Interlocutory Order

- - - - - - - - - - -

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

On June 12, 1986, this Court directed that the petition of C. Tom Carden and Leonard L. Limes for leave to appeal an interlocutory order denying their motion to dismiss Arkoma Associates' action for lack of diversity jurisdiction be held in abeyance pending this Court's decision in 86-3128, Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation. On August 18, 1986, this Court decided *Mesa Operating Limited Partnership*, holding that the citizenship of a limited partnership is determined by the citizenship of the general partners. ___ F.2d ___ (5th Cir., August 18, 1986, no. 86-3128, slip p. 9121). Based on that decision, we conclude that the petitioners have failed to establish that an appeal of the

interlocutory order would materially advance the ultimate termination of the litigation as required by 28 U.S.C. § 1292(b). Accordingly, IT IS ORDERED that the petition is DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 12, 1987

Mr. Richard K. Ingolia
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112

Re: C. T. Carden, et al.,
V. Arkoma Associates
No. 86-817

Dear Mr. Ingolia:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	* CIVIL ACTION
versus	* NO. 85-2295
C. TOM CARDEN, ET AL.	* SECTION "D"
* * * * * * * * * * * *	* MAGISTRATE 4

JUDGMENT

The judgment of the United States District Court for the Eastern District of Louisiana in this civil action appears at page C-1 of petitioners' Petition for Writ of Certiorari.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	* CIVIL ACTION
	* NO. 85-2295
versus	* SECTION "D"
C. TOM CARDEN, ET AL.	* MAGISTRATE 4
* * * * * * * * * * * * *	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Louisiana in this civil action appear at page C-3, et seq. of petitioners' Petition for Writ of Certiorari.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-3624
NO. 87-3917

ARKOMA ASSOCIATES,
Plaintiff-Counter Defendant-Appellee,

versus

C. TOM CARDEN and
LEONARD L. LIMES,
Defendants-Appellants,

MAGEE DRILLING COMPANY, INC.,
Intervenor-Counter Plaintiff-Appellant,

versus

DAVID HEPBURN, ET AL.,
Third Party Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
(CA-85-2295-D 4)

The opinion of the United States Court of Appeals for the Fifth Circuit in this civil action appears at page A-1 et seq. in petitioners' Petition for Writ of Certiorari.

STATE OF ARIZONA (SEAL)

Department Of State

UNITED STATES OF AMERICA
STATE OF ARIZONA SS.

I, ROSE MOFFORD, Secretary of State, do hereby certify that THE ATTACHED ARE TRUE, CORRECT AND COMPLETE COPIES OF THE AMENDED, RESTATED AND REFILED CERTIFICATE OF LIMITED PARTNERSHIP "ARKOMA ASSOCIATES LIMITED PARTNERSHIP", SECRETARY OF STATE CERTIFICATE NUMBER 20000200; WHICH AMENDED RESTATED AND REFILED CERTIFICATE OF LIMITED PARTNERSHIP WAS FILED IN THIS OFFICE SEPTEMBER 10, 1982; AND AMENDED APRIL 1, 1986; AND MARCH 9, 1987.

(SEAL) IN WITNESS WHEREOF I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at Phoenix, the capital, this 27th day of FEBRUARY, A.D. 1986.

/s/ Rose Mofford

CERTIFICATE OF AMENDMENT
TO THE
LIMITED PARTNERSHIP AGREEMENT
OF
ARKOMA ASSOCIATES

Pursuant to the provisions of Arizona Revised Statutes Section 29-309 and the Power of Attorney conferred

upon the General Partners, the undersigned Limited Partnership hereby amends its Limited Partnership Agreement.

The Arkoma Associates Certificate of Limited Partnership as filed with the Maricopa County Recorder on September 1, 1981.

First: The name of the Limited Partnership has been changed from Arkoma Associates to Arkoma Associates Limited Partnership.

Second: Section 1.6 has been added to read as follows:

"1.6 *Statutory Agent*. The agent for service of process on the Partnership shall be Robert L. Bluemle, 3443 North Central Avenue, Suite 400, Phoenix, Arizona 85012."

Third: Section 3.5 has been amended to read as follows:

"3.5 *Withdrawal of Capital*. No Limited Partner shall have the right or power to withdraw from the Partnership except as may be specifically granted by this Agreement."

Fourth: Section 5.1 has been amended to read as follows:

"5.1 *Books of Account*. The Partnership's books and records shall be maintained at the place of business of the Partnership as defined in Section 1.3 hereof. Such books and records shall include the following:

5.1.1 A current list of the full name and last known business address of each partner set forth in alphabetical order,

5.1.2 A copy of the Certificate of Limited Partnership and all Certificates of Amendment thereto, together with executed copies of any Powers of Attorney

pursuant to which any certificate has been executed.

5.1.3 Copies of the Limited Partnership's federal, state and local income tax returns and reports, if any, for the three most recent years, and

5.1.4 Copies of any then effective written partnership agreements and of any financial statements of the Limited Partnership for the three most recent years. Those records are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours.

The General Partner shall have the right, in its absolute discretion, to elect which method shall be used to calculate depreciation of any depreciable Partnership assets.

Fifth: The other provisions of the Limited Partnership Agreement in the form attached hereto are hereby confirmed.

Dated this 24th day of August, 1982.

ARKOMA ASSOCIATES LIMITED PARTNERSHIP

By /s/ David A. Hepburn
David A. Hepburn, General Partner
and Attorney in Fact of
Arkoma Associates Limited Partnership

By /s/ Dudley B. Merkel
Dudley B. Merkel, General Partner
and Attorney in Fact of
Arkoma Associates Limited Partnership

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN TO before me this 24th day of August, 1982 by David A. Hepburn, General Partner and Attorney in Fact of Arkoma Associates Limited Partnership and Dudley B. Merkel, General Partner and Attorney in Fact of Arkoma Associates Limited Partnership.

/s/ Karen J. Propps
Notary Public

My Commission Expires:
December 7, 1984

CERTIFICATE OF LIMITED PARTNERSHIP
AND
LIMITED PARTNERSHIP AGREEMENT
OF
ARKOMA ASSOCIATES
PARTNERS (PT)

This LIMITED PARTNERSHIP AGREEMENT ("Agreement") is made and entered into by and among David A. Hepburn, Dudley B. Merkel, Arizona residents, and Richard Ledbetter and Eldon Qualls, Oklahoma residents, (the "General Partners") and each of the persons who shall become a party to this Agreement (the "Limited Partners") in accordance with the provisions of the Uniform Limited Partnership Act, Title 29, Chapter 3 of the Arizona Revised Statutes. (The General Partners and the Limited Partners shall be referred to collectively as "Partners").

The Partners hereby agree as follows:

ARTICLE I

Organization

1.1 *Formation.* The parties hereto have agreed to form and by executing this Agreement hereby enter into a limited partnership (the "Limited Partnership") formed under the Uniform Partnership Act of the State of Arizona (the "Act"), which shall govern the rights and liabilities of the parties, except as otherwise herein expressly stated.

1.2 *Name.* The business of the Limited Partnership shall be conducted under the name "Arkoma Associates."

1.3 *Place of Business.* The principal place of business of the Limited Partnership shall be at 2701 East Camelback Road, Suite 323, Phoenix, Arizona 85016 provided, however, that the General Partners may change the address of the principal place of business by notice in writing to all Limited Partners. In addition, the Limited Partnership may maintain such other offices as the General Partners may deem advisable at any other place or places within the United States.

1.4 *Purpose.* The primary purpose of the Partnership shall be to purchase, hold and lease two land oil and gas drilling rigs (the "Rigs"). The Partnership initially intends to lease the Rigs to a drilling company which is an affiliate of two of the General Partners pursuant to a Master Lease Agreement (the "Lease") which terms will include the provision for a conditional option for the drilling company to purchase the Rigs at the expiration of the term of such lease. The Partnership may participate in a joint venture involving the use of the Rigs in an oil and

gas drilling program. In addition, the Partnership may otherwise improve, maintain, operate, finance, sell, dispose of or otherwise invest in and deal with the Rigs.

1.5 *General Partners.* The names and business addresses of the General Partners are as follows:

David A. Hepburn
Dudley B. Merkel
2701 East Camelback Road, #323
Phoenix, Arizona 85016

Richard Ledbetter
Eldon Qualls
325 S. Scott
Del City, Oklahoma.

ARTICLE II

Term of Limited Partnership

2.1 *Commencement.* The Limited Partnership shall commence on the date (the "Effective Date") that a Certificate of Limited Partnership (the "Certificate") has been filed under the Act; provided, however, that the Certificate shall not be filed and the Limited Partnership shall not be formed unless the General Partners determine that sufficient capital contributions have been received to warrant acquisition of the Rigs.

2.2 *Termination.* Unless earlier terminated under the provisions of this Agreement, the Limited Partnership shall terminate on the 25th anniversary of the Effective Date.

ARTICLE III

Capital Contributions

3.1 *General Partners.* The General Partners shall make a capital contribution of property to the Partnership in an amount equal to or greater than 1% of the aggregate capital contributions to the Partnership by all the Partners. Either before or promptly after the Effective Date, the General Partners shall contribute to the Partnership all of their rights, titles and interests in and to any contracts for the construction of the Rigs, and any purchase orders for equipment for the Rigs. For their contribution, the General Partners shall receive an aggregate interest in 1% of the profits and losses of the Partnership as described in ARTICLE IV.

3.2 *Limited Partners.* Capital of the Limited Partners shall be contributed in Units of $94,686. Payment for the Units shall be made at the time of subscription and shall be evidenced by either (i) a check in an amount representing the number of Units subscribed for; (ii) through letter of credit financing under terms and conditions as described in the Subscription Agreement issued in connection with the offering of Partnership interests.

3.3 *Assessments.* No Limited Partner shall be required to make any additional capital contribution beyond that provided for in paragraph 3.2.

3.4 *Loans.* If the General Partners determine that the business of the Partnership requires capital for any reason in addition to that contributed by the Partners, the General Partners shall grant to the Partners or to unaffiliated persons, the right to loan or advance such funds to

the Partnership upon terms and conditions to be agreed upon among the parties; provided, however, that any such loans shall be only on an unsecured basis. The amount of any loan from a Partner shall not be an increase in the capital account of the lending partner or entitle the lending partner to any increase in his distributions of the Partnership.

3.5 *Withdrawal of Capital.* No Limited Partner shall have the right to withdraw or reduce his contribution to the capital of the Partnership except as the result of dissolution of the Partnership, or as otherwise provided in the Act.

3.6 *Capital Accounts.* The General Partners shall cause to be maintained in the books and accounts of the Partnership a capital account for each Partner to which shall be credited his or her capital contributions and which shall be increased by (a) any additional capital contributions, (b) that Partner's distributive share of Partnership profits and decreased by (i) that Partner's distributive share of Partnership losses and (ii) any distribution of cash or property in reduction of that Partner's capital contribution.

ARTICLE IV

Profits and losses; Allocations, Distributions

4.1 *Profit and Loss.* Each of the following shall be allocated at the end of each fiscal year to the respective accounts of the Partners in the ratio of 1% to the General Partners and 99% to the Limited Partners:

(1) All income of the Limited Partnership, including gains realized upon the sale, exchange or involuntary conversion of any part or all of the assets of the Limited Partnership;

(2) All losses of the Limited Partnership; and

(3) All Federal and state income tax deductions and credits which are available to the Partnership.

The net Profits and net Losses shall be computed each quarter and divided among and charged against those who are Partners at the start of each quarter in proportion to their Partnership interests. Upon transfer of a Limited Partnership interest, Profit and Loss will be allocated to the transferee beginning with the next quarter.

4.2 *Allocation of General Partners' Interest.* The 1% interest in the Partnership held by the General Partners shall be allocated as follows: David A. Hepburn, 0.25%; Dudley B. Merkel, 0.25%; Richard Ledbetter, 0.25%; and Eldon Qualls, 0.25%.

4.3 *Allocation Upon Transfer of Interests.* Upon any transfer of a Partnership interest, the distributive share of all items of income or loss of the Partnership for the relevant year shall be allocated between the transferor and the transferee on the basis described in paragraph 4.1 hereof.

4.4 *Distributions.* Cash available for distribution shall be distributed quarterly (or at such more frequent intervals as the General Partners may determine) to the Partners in accordance with their Partnership interests at the time of distribution. Each such Limited Partner's

interest shall be equal to the percentage derived by multiplying the aggregate Limited Partnership interests by a fraction whose numerator is the number of Units held by the individual Limited Partner and whose denominator is the total number of Units.

4.5 *Depreciation and Depletion Deductions.* Pursuant to Section 704 of the Internal Revenue Code and for purposes of any applicable state or local income tax law, the Partners agree that all items of income, gain, loss, deductions including but not limited to the depreciation deduction and credit of the Partnership shall be allocated among the Partners in accordance with the provisions of Paragraphs 4.1 and 4.2 above. For the purpose of computation of the allowance for depletion, the Partnership's basis in Partnership oil and gas properties shall be allocated to the Partners on the basis of each Partner's share of income of the Limited Partnership.

Each Partner shall be required to report annually back to the Partnership through the General Partners, the amount and method of computing his or her depletion deduction, whether percentage depletion or cost depletion.

4.6 *Intangible Drilling and Development Costs.* For federal income tax purposes and to the extent permitted for state and local income tax purposes, the Partnership shall elect to charge to expense all intangible drilling and development costs pursuant to the provisions of Section 263(c) of the Internal Revenue Code. All such intangible drilling and development costs shall be allocated among the Partners in accordance with the provisions of Paragraphs 4.1 and 4.2 above.

ARTICLE V

Books and Records

5.1 *Books of Account.* The Partnership shall maintain, at the office of the Partnership or of its accountant, books, records, and accounts which fairly present the operations of the Partnership. The books shall be available for inspection by any Partner, general of limited, or the representatives of any Partner, at all reasonable times. The General Partner shall have the right, in its absolute discretion to elect which method shall be used to calculate depreciation of any depreciable Partnership assets.

5.2 *Statements.* Within sixty (60) days after the close of each Partnership accounting year (which year shall close December 31), and upon the termination of the Partnership, the General Partners shall prepare and cause to be examined and reported upon by an independent certified public accountant a report of the Partnership's operations including such detailed information as is necessary to enable the Limited Partners to complete their tax returns. Within sixty (60) days after the close of the period covered by the report, a copy or condensed version of such report shall be furnished to each of the Partners.

5.3 *List of Partners.* At any time any Limited Partner may demand a list of the names and addresses of, and interests held by, all Partners. The General Partners shall furnish such list within ten (10) days of receipt of such demand.

ARTICLE VI

Management

61. *Powers of the General Partners.* The General Partners shall manage and shall have exclusive and complete control of the operations of the Partnership and shall have power to do all things necessary or advisable to carry out the purposes of the Partnership. Without limiting the generality of the foregoing, the General Partners shall have full power and authority, on behalf of the Partnership:

(a) to expend Partnership funds in furtherance of the business of the Partnership and to acquire the Rigs and to execute, deliver and carry out the terms of the Lease on behalf of the Partnership; (b) to lend money of the Partnership to affiliates of any of the General Partners; (c) to hold, improve, maintain, operate, finance, lease, sell, dispose of and otherwise deal with and invest in the Rigs; (d) to enter into joint ventures, farm-outs, contract drilling or other arrangements involving the use of the rigs with any person including affiliated parties; (e) to pay all debts and obligations of the Partnership; (f) to lend money to the Partnership and secure such indebtedness by pledging assets of the Partnership; (g) to make such elections under the tax laws of the United States, the several states and other relevant jurisdictions as to the treatment of items of Partnership income, gain, loss, deduction and credit, and as to all other relevant matters, as it believes necessary or desirable; (h) to determine the terms of the offering of Limited Partnership interests, including the amount of discounts allowable, commissions to be paid and the manner of complying with applicable law; (i) to execute an agreement(s) with affiliated or unaffiliated persons or entities in connection with the offering and sale of Partnership interests, (j) to employ such agents, employees, independent contractors, attorneys and

accountants as the General Partners deem reasonably necessary, including persons affiliated with the General Partners; (k) to effect necessary insurance for the proper protection of the Partnership and (l) of the General and Limited Partners, or (2) of either the General Partners or Limited Partners; (l) to pay, collect, compromise, arbitrate, of otherwise adjust any and all claims or demands of or against the Partnership: (m) to bind the Partnership in all transactions involving the Partnership's property or business affairs.

6.2 *Duties and Restrictions on the Authority of the General Partners.*

The General Partners shall:

(a) have the obligation to use their best efforts to cause the lessee of the Rigs to observe all the terms and conditions of the Lease, including maintenance of appropriate insurance coverage, and payment of all taxes required pursuant to such Lease, and shall be under a fiduciary duty to conduct the affairs of the Partnership in the best interests of the Partnership. The General Partners shall at all times act in good faith and exercise due diligence in all activities relating to the conduct of the business of the Partnership.

(b) not permit any person who makes a loan to the Partnership to acquire, at any time as a result of making the loan, any direct of indirect interest in the profits, capital, or property of the Partnership, other than as a secured creditor;

(c) not do business in any jurisdiction or political subdivision in which the General Partners and the Partnership have not previously taken such steps as may be necessary to assure for the Limited Partners the same

limited liability as is provided for limited partners in limited partnerships formed under the Act;

(d) not commingle the Partnership's funds or assets with those of any other person, or employ or permit any person to employ such funds or assets in any manner except for the exclusive benefit of the Partnership;

(e) not bind or obligate the Partnership with regard to any matter outside the scope of the Partnership business;

(f) not use the Partnership name, credit, or property for other than Partnership purposes;

(g) not sell or otherwise dispose of the Rigs without the affirmative vote of 80% of all the Limited Partners.

6.3 *Disposition of a Rig.* Except as provided in Section 6.2, the General Partners shall have the right, power and authority to lease, sell, exchange, refinance or grant an option for the sale of, all or any portion of the property of the Partnership at such rental, price or amount, for cash, securities or other property and upon such other terms as the General Partners, in their sole discretion, deem proper. The proceeds resulting from any refinancing if the Rigs or other property of the Partnership may not be reinvested in new acquisitions of drilling rigs.

6.4 *Relationship Among General Partners.* Without limitation of each General Partner's joint and several responsibility to perform all obligations required of the General Partners under this Agreement or at law, as among the General Partners, each General Partner agrees

to perform his obligations under this Agreement and agrees to indemnify and hold the other General Partners harmless for all liability, loss, cost and expense (including, without limitation, the cost of litigation and attorneys' fees) incurred by the other General Partners as a result of such General Partner's failure to so perform such obligations. In the event of any dispute or difference among the General Partners which cannot be decided by the General Partners, the decision shall be reached by arbitration in accordance with the then current rules of the American Arbitration Association.

6.5 *Allocation of Time to Partnership Business.* The General Partners shall not be required to devote full time to the affairs of the Partnership but shall devote whatever time, effort and skill may be necessary for the conduct of the Partnership's business. The General Partners may engage in any business they individually or collectively choose, including businesses related to or competitive with the business of the Partnership. The General Partners may engage any person or entity, including affiliates, as agent for them, to perform all or any part of their duties hereunder; provided, however, that the General Partners will retain overall responsibility, for the management of the Partnership's business.

6.6 *Compensation of General Partners.*

(a) Messrs. Merkel and Hepburn shall receive an organization and lease acquisition fee in an amount equal to the net syndication fees as defined in the Private Offering Memorandum issued in connection with the offering of Partnership Interests.

(b) As an administrative management fee, Messrs. Merkel and Hepburn shall receive reimbursement for the actual costs incurred by them in managing the business affairs of the Partnership.

(c) The Partnership will bear the expense and the General Partners will be reimbursed from Partnership funds for any advances made for all expenses of the Partnership's accountants, legal counsel, documentation, printing expenses and other expenses incurred in the formation of the Partnership and in arranging the purchase of the Rigs.

6.7 *Indemnification of General Partners.* No General Partner shall be liable, responsible or accountable in damages or otherwise to any of the Partners for, and the Partnership shall indemnify and save harmless the General Partners from, any loss or damage incurred by reason of any act or omission performed or omitted by him in good faith on behalf of the Partnership or the Limited Partners and in a manner reasonably believed by him to be within the scope of the authority granted to him by this Agreement and in the best interests of the Partnership or the Limited Partners, provided that such act or omission was not performed or omitted fraudulently or in bad faith, constituted gross negligence or any other breach of fiduciary duty with respect to such acts or omissions and further provided that the satisfaction of any indemnification and any saving harmless shall be from the Partnership assets and no Limited Partner shall have any personal liability on account thereof.

ARTICLE VII

Limited Partners

7.1 *No Participation in Management.* The Limited Partners shall not take any part in the control or management of or transact any business for the Partnership, nor shall the Limited Partners have power to sign for or to bind the Partnership. The Limited Partners shall not be personally liable for any of the debts or losses of the Partnership or for the losses of the General Partners.

7.2 *Participation in Other Activities.* This Agreement shall not preclude or limit, in any respect, the right of any Limited Partner (or officer, director, stockholder, partner, trustee or beneficiary thereof) to engage or invest in any business activity of any nature or description, including those which may be equivalent to or in competition with the Partnership. Neither the Partnership nor any Limited Partner shall have any right by virtue of this Agreement or any relationships created hereby in or to such other ventures or activities or to the income or proceeds derived therefrom.

7.3 *Rights of Limited Partners.*

(a) A limited partner shall have the same rights as a general partner to:

(1) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them.

(2) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable.

(3) Have dissolution and winding up by degree of court.

(b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in Articles III and IV respectively.

7.4 *Meetings.* The General Partner or Limited Partners representing 33-1/3% of the Limited Partnership Interests may at any time on at least fifteen (15) days' written notice to all Partners call a meeting of the Partnership. Unless otherwise specified, all meetings of the Partnership shall be held at 2:00 P.M. at a location specified by the General Partners. At any meeting of the Partnership, Limited Partners may vote in person or by proxy. Limited Partners holding 66-2/3% of the Limited Partnership interests present in person or by proxy, shall constitute a quorum at any Partnership meeting. Any question relating to the Partnership which may be considered and acted upon by the Limited Partners hereunder (whether by written statement upon notice or otherwise) may be considered and acted upon by vote of the required percentage of Limited Partnership Interests at a Partnership meeting. Procedure for such meetings shall be according to the Robert's Rules of Order, with one of the General Partners designated by the General Partners as chairman.

ARTICLE VIII

Transfer of Partnership Interests

8.1 *Interest of General Partners.* Subject to the provisions of Paragraph 6.8, the interest in the Partnership

held by any 1 or 2 of the individual General Partners may be transferred with the consent of the remaining General Partners and notice of the transfer to the Limited Partners. Should more than 2 of the General Partners desire to transfer their interest for any reason, such transfer(s) shall not occur without the consent of Limited Partners holding 66-$^{2}/_{3}$% of the Limited Partnership interests.

8.2 *Assignment of Limited Partnership Interests.* Each Limited Partner may assign his interest in whole or in part, with the prior written consent of the General Partners, subject to compliance with applicable law and regulations and subject to the provisions of this paragraph. Any assignment must relate to at least one Unit and no partial assignment may result in any Limited Partner or assignee holding less than one Unit of Limited Partnership interest. No assignment shall be effective until notice containing such information and representations as the General Partners may reasonably request, signed by both the assignor and the assignee, and accompanied by such opinions or other documents as may be required to satisfy any requirement of this paragraph, has been received by the General Partners. Any assignment which is permitted hereunder shall be effective as of the close of the calendar quarter during which such notice is received. No assignment which, in the judgment of the General Partners made by written notice to the assignor within thirty (30) days of receipt of the aforesaid notice, would jeopardize the status of the Partnership as a partnership or cause a termination of the Partnership for Federal Income Tax purposes shall be effective for any purpose. No assignment shall be permitted unless a registration statement has been filed and become effective under the Securities Act of 1933 or an exemption is available, and

all other requirements of law have been satisfied, as evidenced by a no-action letter of the Securities and Exchange Commission or an opinion of counsel to the assignee or assignor satisfactory to counsel for the Partnership.

8.3 *Substituted Limited Partner.* The transferee of any Limited Partnership interest may become a Substituted Limited Partner only with the content of all the Partners. A transferee becomes a Substituted Limited Partner when the Certificate of Limited Partnership is effectively amended to reflect such substitution; such amendment shall be accomplished as soon as practicable after the Partners consent to such substitution. A transferee who does not become a Substituted Limited Partner has no right to any information regarding the Partnership or to inspect the Partnership books but is entitled only to a share of income or return of capital to which the transferor would be entitled.

ARTICLE IX

Dissolution of the Partnership

9.1 *Events Causing Dissolution.* The Partnership shall dissolve and terminate upon the occurrence of any of the following events:

(a) The bankruptcy, death, dissolution or adjudication of incompetence of a sole remaining General Partner, provided, however, that the business of the Partnership may be continued and the Partnership reconstituted if 80% of the Limited Partners so agree.

(b) Sale or other disposition of all the property of the Partnership;

(c) Dissolution and winding up by decree of court.

(d) The occurrence of any other event causing the dissolution of the Partnership under the laws of the State of Arizona.

(e) The affirmative vote of 80% of the Limited Partners.

9.2 *Winding Up.* Upon dissolution of the Partnership, the General Partners shall wind up the Partnership's affairs by liquidating its assets and applying its funds in the following manner: (1) the liabilities of the Partnership shall be paid or otherwise adequately provided for; (2) any excess funds shall be distributed to the Partners in proportion to their respective capital accounts at the time of distribution.

ARTICLE X

Power of Attorney

10.1 *Grant of Power of Attorney.* Each of the Limited Partners irrevocably constitutes and appoints the General Partner as his true and lawful attorney-in-fact: (i) to make, execute, swear to, acknowledge and file, in his name, place and stead, such documents as the Limited Partners have expressly agreed to execute and deliver hereunder, including, without limitation, the original and any modification, amendment or cancellation of the Certificate of Limited Partnership and any Fictitious Business Name Statement; (ii) to obtain a loan for the account of the Partnership, the principal amount being secured by letters of credit and funds as set forth more fully in the Subscription Agreements of the Limited Partners.

ARTICLE XI

Miscellaneous

11.1 *Covenant to Sign Document.* Without limiting the power granted by paragraph 10.1, each Partner covenants, for himself and his successors and assigns, to execute, with acknowledgment or verification if required, any and all documents and writing which may be necessary or expedient in the creation of the Partnership and the achievements of its purposes, specifically including the Certificate of Limited Partnership and all amendments thereto, as well as any cancellation thereof.

11.2 *Tax Returns.* Each Partner hereby agrees to execute promptly (with acknowledgment or affidavit, if requested by the General Partners) all such agreements, certificates, tax statements, tax returns and other documents as may be required of the Partnership or its Partners by the laws of the United States of America or any state in which the Partnership conducts or plans to conduct business.

11.3 *Notices.* All notices which any Partner may desire or may be required to give any other Partner shall be in writing and shall be given either personally or by prepaid first class mail directly to the Partner's address as shown on the Certificate of Limited Partnership, or as later entered upon the books of the Partnership pursuant to written notification to the General Partner.

11.4 *Recovery of Attorneys' Fees.* If the Partnership or any Partner on behalf of the Partnership is a party to an action to enforce any of the terms of this Partnership Agreement or of any other contract relating to the Partnership, or any action in any other way pertaining to Partnership affairs of this Agreement, the Partnership or

such Partner, if it or he prevails, shall be entitled to recover its or his costs, including a reasonable attorney's fee, incurred in prosecuting or defending the action.

11.5 *Applicable Laws.* The laws of the State of Arizona shall govern all matters with respect to this Agreement, including all matters related to formation, construction and performance of this Agreement.

IN WITNESS WHEREOF, each party has executed this Limited Partnership Agreement on the date set forth opposite the name of each.

For the General Partners:

Date: 8/31/81

/s/ David A. Hepburn
General Partner

Date: 8/31/81

For each of the persons named in the attached Schedule A, which names are by this reference are incorporated herein

By: Dudley Merkel
General Partner

ARKOMA ASSOCIATES

Schedule "A" to Certificate of Limited Partnership and Limited Partnership Agreement.

Limited Partner	*Address*	*Subscription Amount*	*Number of Units*

The Office of the Secretary of State Hereby Disclaims Any Representation the these Documents, Filed Pursuant to the Uniform Limited Partnership Act, Conform to Law.

/s/ Rose Mofford
Arizona Secretary of State

SECOND
CERTIFICATE OF AMENDMENT
TO THE
CERTIFICATE OF LIMITED PARTNERSHIP
AND
LIMITED PARTNERSHIP AGREEMENT
OF
ARKOMA ASSOCIATES LIMITED PARTNERSHIP

(Filed 1, April 1986)

Pursuant to the provisions of Arizona Revised Statutes Section 29-309, the undersigned Limited Partnership hereby amends its Certificate of Limited Partnership and Limited Partnership Agreement.

The Certificate of Limited Partnership of Arkoma Associates Limited Partnership was filed with the Maricopa County Recorder on September 1, 1981. A Certificate of Amendment was filed with the Arizona Secretary of State on September 10, 1982.

First: Schedule "A" to the Certificate of Limited Partnership and Limited Partnership Agreement is hereby amended to read as follows:

SCHEDULE "A"

ARKOMA ASSOCIATES
LIMITED PARTNERS

	No. of Units
Mr. Lloyd Canton CA Planning 25 Orinda Way, Suite 308 PO Box 429 Orinda, CA 94563	
Ms. Marie Weaver c/o Lloyd Canton PO Box 429 Orinda, CA 94563	1/2
Mr. Richard Aylward Mr. Robert Aylward Aylward Products 1201 Forest Street Kansas City, MO 64106	1
Larry Berberich 10706 West 109th Overland Park, KS 66220	1
Dr. Allen Parelman 6724 Troost Kansas City, MO 64131	1/2
Mr. Bill Kryger 217 West 125th Terrace Kansas City, MO 64145	1
LVA Partnership c/o Allen Abramson PO Box 6925 Kansas City, MO 64130	1
Dr. Richard Lynch #2 35th Street Des Moines, IA 50312	1

McFadin Partnership Three Oaks Building 5440 North Oak Kansas City, MO 64118	1
John McKeever 12438 West 85th Terrace Lenexa, KS 66215	1/2
Mr. Percy McKinley 12813 Oakmont Drive Kansas City, MO 64145	1/2
Mr. Nat N. Nast 2920 West 68th Street Mission Hills, KS 66208	1/2
Dr. John Pawsat 1210 West 58th Street Kansas City, MO 64113	1/2
Mr. Henry Rankin 11725 North Eastern Kansas City, MO 64156	1
Mr. David Russell 1050 Home Savings Building 1006 Grand Avenue Kansas City, MO 64106	1
Mr. Robert Sampson 15 Town View Circle Platte City, MO 64079	1
Dr. Daniel Scharf 2502 West 69th Terrace Mission Hills, KS 66208	1
Mr. Robert Schneider 8650 West College Boulevard Suite 201 Overland Park, KS 66210	1

Mr. Lary Schulz
8320 North Oak Trafficway
Kansas City, MO 64118 — 1/2

Mr. Keith Shultz
PO Box 2172
Independence, MO 64055 — 1

Mr. Elton Shannon
3508 West 83rd Terrace
Shawnee Mission, KS 66206 — 1/2

Mr. Ernest Straub
9308 West 87th Terrace
Shawnee Mission, KS 66212 — 1

Mr. Henry Stram
194 Belle Terre Drive
Covington, LA 70433 — 1

Ms. Frances Swan
8015 West 115th Street
Overland Park, KS 66210 — 1

Mr. John Sullivan
Mid American Bank & Trust Co.
PO Box 2947
Shawnee Mission, KS 66201 — 1

Mr. Jon Symon
100 Westport Square
4200 Pennsylvania
Kansas City, MO 64111 — 1/2

Mr. David Wharton
2 Northwest 53rd Terrace
Kansas City, MO 64118 — 1

Dale Williams
1191 Highway 152
Liberty, MO 64068 — 1/2

Dr. Robert Doering
6101 High Drive
Shawnee Mission, KS 66208 — 1

Mr. Jim Veselich
James D. Veselich & Associates
5440 North Oak Trafficway
Kansas City, MO 64118 — 1

Second: The other provisions of the Limited Partnership Agreement are hereby confirmed.

DATED this 31st day of March 1986.

ARKOMA ASSOCIATES LIMITED PARTNERSHIP

By /s/David A. Hepburn
David A. Hepburn, General Partner and Attorney-in-Fact of Arkoma Associates Limited Partnership

By /s/ Dudley B. Merkel
Dudley B. Merkel, General Partner and Attorney-in-Fact of Arkoma Associates Limited Partnership

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN TO before me this 31 day of March 1986 by David A. Hepburn, General Partner, and Dudley B. Merkel, General Partner, of Arkoma Associates Limited Partnership.

/s/ Susan B. Crawford
Notary Public
(SEAL)

My Commission Expires:
Feb. 27, 1989

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-1476

In The

Supreme Court of the United States

October Term, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONERS

RICHARD K. INGOLIA*
KENNETH J. BERKE
BERKE & INGOLIA
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Counsel for Petitioners

**Attorney of Record for Petitioners*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. T. Carden, et al.*, not reported, (5th Cir. 1988), rehearing denied, January 5, 1989; is in conflict with this Court's decisions in *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900) and in *Navarro Savings Association v. Lee, et al.*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

2. Whether the common citizenship of a limited partner of a plaintiff Arizona limited partnership and that of the defendants is fatal to the presence of diversity jurisdiction.

STATEMENT OF PARTIES

Pursuant to Rule 21.1 (b) and Rule 28.1 of the *Rules* of this Court, counsel for petitioners certify that the following named persons are parties to this proceeding:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Robert Eltonhead;
(20) Dennis Swan;
(21) Dick Gibson;
(22) Dr. John Hagan;
(23) Leo Hallack;
(24) Robert E. Harmon;
(25) Richard L. Harmon;
(26) Earl Hoatson;
(27) Andrew Kaufman;
(28) Dr. Allen Parelman;
(29) Bill Kryger;
(30) L V A Partnership;
(31) Dr. Richard Lynch;
(32) Mc Fadin Partnership;
(33) John Mc Keever;
(34) Percy Mc Kinley;
(35) Nat N. Nast;
(36) Dr. John Pawsat;
(37) Henry Rankin;
(38) David Russell;
(39) Robert Samson;
(40) Dr. Daniel Scharf;
(41) Robert Schneider;
(42) Larry Shultz;
(43) Keith Shultz;
(44) Elton Shannon;
(45) Ernest Staub;
(46) Frances Swan;
(47) John Sullivan;
(48) Jon Symon;
(49) David Wharton;
(50) Dale Williams;
(51) Dr. Robert Doering; and
(52) Jim Veselich.

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No. 88-1476

In The

Supreme Court of the United States

October Term, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1988, is not reported, but appears at page A-1, et seq. of petitioners' application for certiorari.

The findings of fact and conclusions of law of the United States District Court for the Eastern District of

Louisiana were entered on July 29, 1987, and appear at page C-3, et seq. of petitioners' application for certiorari.

JURISDICTION

This Court granted petitioners' Petition for Writ of Certiorari on May 1, 1989, to review the judgment of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of the Supreme Court is invoked pursuant to *28 U. S. C. 1254 (1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States:

United States Constitution Article III, Section 2 states:

> The judicial power shall extend to all Cases, in Law and Equity, . . . between citizens of different States . . .

28 U. S. C. 1332 (a), states:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of costs, and is between –
>
> (1) citizens of different States; . . .

STATEMENT OF THE CASE

On May 23, 1985, Arkoma Associates (hereafter sometimes "Arkoma") filed this action against C. T. Carden (hereafter sometimes "Carden") and Leonard L. Limes (hereafter sometimes "Limes") as the guarantors of the performance of Magee Drilling Company (hereafter sometimes "Magee" or collectively with Carden and Limes, "Petitioners") as the lessee of an equipment lease (Exhibit P-3 of District Court Record) entered into with Arkoma as lessor. During the course of the proceedings in the District Court, Magee intervened as a party defendant and a counterclaimant.

Carden and Limes filed a motion to dismiss in the District Court (page 58 of the Joint Appendix) for lack of diversity jurisdiction based on the common citizenship of Carden, Limes, and a limited partner of Arkoma. Such common citizenship is the subject of the stipulation entered into among Carden, Limes, and Arkoma (page B-1, et seq. of Petitioners' Petition for Writ of Certiorari, page 56 of the Joint Appendix). The District Court denied the motion to dismiss, but certified the jurisdictional question for interlocutory appeal pursuant to *28 U. S. C. 1292 (b)*. The Court of Appeal denied the interlocutory appeal based on its decision in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986). Thereafter, a petition for certiorari was filed in this Court and denied. The case was tried on the merits, and judgment was rendered in favor of Arkoma. Petitioners appealed. The Court of Appeals affirmed the District Court, found diversity jurisdiction present,

denied rehearing, and Petitioners again sought certiorari which was granted by this Court on May 1, 1989.

SUMMARY OF ARGUMENT

This Court, in *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900), held that the citizenship of all partners of a limited partnership must be considered in determining diversity. This holding was approved in *Navarro Savings Association v. Lee*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980) and should not now be abandoned.

An Arizona limited partnership is an unincorporated association. As such, the citizenship of all partners, both general and limited, determines the presence or absence of diversity jurisdiction.

Citizenship between plaintiff and defendants in this case is not diverse because of the presence of common citizenship among a limited partner of plaintiff and Carden and Limes. As no other basis for federal jurisdiction exists, the federal courts are without jurisdiction in the premises.

The adoption of a rule which determines the citizenship of a limited partnership on the basis of that of the "general partners" alone is entirely unworkable because of the variety of considerations which must attend a determination of the identity of such individuals.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN *GREAT SOUTHERN FIRE PROOF HOTEL V. JONES*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900) AND IN *NAVARRO SAVINGS ASSOCIATION V. LEE*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

In *Great Southern Fire Proof Hotel v. Jones*, supra, suit was filed by a plaintiff limited partnership, but the citizenship of all partners was not alleged. This Court noted the deficiency on its own motion and held, citing *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800, 9 S. Ct. 426 (S. Ct. 1889), that because jurisdiction rested only upon diversity, the citizenships of all partners must be alleged and considered for diversity purposes. *Great Southern*, unless overruled in these proceedings, controls the present case.

The law has not changed since *Great Southern*; indeed, not since *Chapman*, supra, and the comparatively recent case of *Navarro*, supra, confirms, unequivocally, that this Court does not intend to abandon its prior holdings. To the contrary, *Navarro*, with greater clarity and specificity than before, sets forth the relevant considerations in diversity cases.

Why then did the Fifth Circuit decide the present case to the contrary? Counsel suggests two reasons: 1) The Fifth Circuit's decision in *Lee et al. v. Navarro Savings Association*, 597 F. 2d 421 (5th Cir. 1979) was in fact affirmed, and the Fifth Circuit mistakenly takes the affirmation as approval of its reasoning. That misconception

having taken root, the Fifth Circuit has not considered itself at liberty to again till the jurisdictional soil in either *Mesa*, supra, or the present case, unless otherwise directed by this Court; 2) The Fifth Circuit mistakenly believes that an express business trust and a limited partnership are indistinguishable insofar as their treatment for jurisdictional purposes is concerned.

Clear evidence of this Court's disapproval of the Fifth Circuit's reasoning is found by comparing the analogy made by the Fifth Circuit in *Lee*, supra, and *Mesa*, supra, to this Court's footnote 10 in *Navarro*. The Fifth Circuit sustained diversity jurisdiction in both by analogizing the business trust to a limited partnership relying on *Colonial Realty Corporation v. Bache & Company*, 358 F. 2d 178 (2d Cir. 1966) which held that in a diversity case involving a limited partnership the citizenship of the general partners alone need be considered. The *Mesa* court said that the reasoning by which the citizenship of the trustees alone need be considered was "equally appropriate here." It was not equally appropriate and this Court said so in footnote 10 of *Navarro*:

> The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction. . . .

The Fifth Circuit in *Mesa* went on to characterize a limited partnership in these words:

> A limited partnership is also neither corporation nor association but a similar hybrid. . . .

A limited partnership is not a "similar hybrid" to an express business trust. It is not similar and it is not a

hybrid. In a limited partnership, no law makes the general partners the title owners of the assets of the partnership as the trustee is the title owner of the trust assets. In a limited partnership, no law grants tc the limited partners the right only to compel delivery of title to them by appropriate action, as the beneficiaries of a trust might do in proper circumstances. To the contrary, the limited partners own their portion of the assets of the partnership from the moment of the acquisition of such assets. As to being a "hybrid," the seminal question is simply this: is a limited partnership a juridical person or corporation which has the legislatively recognized citizenship of the state in which it is formed, or is it not? If not, it is a group of people who own something, no more, no less. On two occasions this dichotomy was recognized in *Navarro*. At 100 S. Ct. at page 1782, this Court held:

> "Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, unincorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. 842 (limited partnership association) . . .

(Parenthetical comment, the Court's). Then, in footnote 9 the Court cited *United Steelworkers of America v R. H. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965) which held that the citizenships of all members of a labor union were relevant to the determination of diversity jurisdiction. Once the unincorporated character of the labor union was established, it followed inexorably, that the citizenship of all members must be

considered for diversity purposes. The *Navarro* Court went on to note that the presence of standing to sue in the name of an unincorporated association says nothing about diversity jurisdictional requirements, to-wit:

> There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17 (a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases. . . . In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17 (a). To establish diversity, however, the union must rely upon the citizenship of each of its members. *Steelworkers v. Bouligny, Inc.* . . .

The line between express business trusts and limited partnerships, like the line between incorporated and unincorporated associations, is, therefore, thick and black.

As to the "real party in interest test" of *Navarro*, it should be noted that no limited partnership has the foundation of *Federal Rules of Civil Procedure, Rule 17(a)* upon which to rest. The cited rule designates trustees of an express trust as real parties in interest. There is no such designation relative to partnerships or limited partnerships. What then is the basis of the Fifth Circuit's selection of general partners *only* as real parties in interest, to the exclusion of the limited partners:

Do the general partners own the assets of the partnership to the exclusion of the limited partners? They do not. To the contrary, the limited partners own 99% of the assets of Arkoma, the generals, 1%.

Is there a recognized division of title between general and limited partners? There is not. Title is vested in all of the partners from the moment of acquisition of partnership property.

Are the limited partners of Arkoma debarred from all involvement in the affairs of the partnership? They are not. They may veto the sale of partnership assets and control the use of the proceeds of such sales. (See Arkoma articles of partnership sections 6.2 and 6.3 [page 82 et seq. Joint Appendix]).

II. THE CITIZENSHIPS OF THE LIMITED PARTNERS OF AN ARIZONA LIMITED PARTNERSHIP ARE RELEVANT TO THE PRESENCE OR ABSENCE OF DIVERSITY JURISDICTION.

The Third Circuit in *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); the Seventh Circuit in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984); and the Eighth Circuit in *Stouffer Corporation v. Breckenridge*, 859 F. 2d 75 (8th Cir. 1988) have held that the citizenship of both the general and limited partners must be considered in determining diversity jurisdiction. They have correctly reasoned thusly:

1) A limited partnership is an unincorporated association whose citizenship is controlled by that of its members. *Trent*, supra, citing *Great Southern Fire Proof Hotel Co.*

v. Jones; *Elston* and *Stouffer*, supra, citing *United Steelworkers v. R. H. Bouligny, Inc.*; *New York Teachers*, citing *Great Southern* and *United Steelworkers*;

2) This Court's decision in *Navarro*, did not change the foregoing rules, rather it specifically distinguished between an express trust as in *Navarro*, and a limited partnership. See quotation from *Navarro* herein at page 7;

3) This Court's decision in *Navarro* did not compel the application of a "real party in interest" test to limited partnerships as the basis for ignoring the citizenship of limited partners, *Trent*. Alternatively, even if a "real party in interest" test is applied, those parties are the members of the partnership, both general and limited, *Elston*.

Each court concluded that the presence of a non-diverse limited partner destroyed diversity citizenship. The Fifth Circuit has never responded to these considerations, beyond its attempt to equate limited partnerships with express business trusts for jurisdictional purposes, an equation in which the argument will never equal the result.

There are additional compelling factors which are peculiar to the present case:

1) Arkoma is an Arizona partnership. Its articles of partnership provide that they shall be governed by that State's law (page 92, Joint Appendix). The Arizona Limited Partnership Act, *Arizona Revised Statutes 29-301, et seq.* (effective July 24, 1982, the law in effect when this civil action was filed) does not provide that limited partnerships are juridical persons having an existence separate and apart from their members. Therefore, there is no

authority for treating Arkoma as a juridical person, in the sense that a corporation is so treated, and imputing Arizona citizenship to it.

2) *Section 26* of the *Uniform Limited Partnership Act*, enacted as former *Arizona Revised Statutes 29-326*, since repealed, provided:

> A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

This provision was relied upon in error by the Second Circuit in *Colonial Realty*, supra, which decision was in turn relied upon by the Fifth Circuit in *Lee*. The concept of standing to sue is thoroughly distinguishable from that of diversity jurisdiction as this Court pointed out in footnote 9 to its opinion in *Navarro*. (See page 7 herein.) Yet, Arkoma is denied even this illusion as the quoted *Section 26* was intentionally omitted from the Arizona act when it was revised in 1982.

3) The Arkoma limited partners do participate in the affairs of the partnership. As reflected by Arkoma's articles of partnership, paragraphs 6.2 and 6.3, the limited partners may veto the sale of the partnership assets and control the use of proceeds of such sales (page 82, et seq., Joint Appendix). Therefore, no delineation of control, such as that characterized by the Fifth Circuit in *Lee*, and *Mesa*, in the partnerships there under consideration, exists in the case of Arkoma. Nor is it likely to be found in most limited partnerships whose limited partners are unwilling to accept, with supine repose, the unbridled activities of the general partners.

III. THE METHOD OF DETERMINING THE CITIZENSHIP OF A LIMITED PARTNERSHIP ADVANCED BY THE FIFTH CIRCUIT COURT OF APPEALS IS UNWORKABLE.

Perhaps even litigants might universally agree that there is a benefit to be obtained in knowing, in advance of filing suit, when diversity jurisdiction exists and when it does not. In an ideal world, counsel would be able to determine whether the parties to their litigation are individuals, corporations, unincorporated associations, trusts, or successions and know, with reasonable certainty, if the cause at hand may be litigated in federal court on grounds of diversity of citizenship alone.

The Fifth Circuit proposes the following rule to which strict adherence will be required:

> . . . where it is possible to identify clearly a class of members as the real party to a controversy, the citizenship of that class alone is relevant for diversity purposes.

(*Mesa*, at page 240)

What qualities will that "class of members" possess in common:

1) Will they own more than 1%, 50%, or 90% of the partnership assets?

2) Will they enjoy administrative control over the affairs of the partnership to the complete exclusion of the limited partners, substantial exclusion, or partial exclusion?

3) Will they be allocated all of the taxpayer advantages of ownership, depreciation, or depletion, some of them, or none of them?

4) Will they be deprived of any involvement in partnership affairs, or will the price of such involvement be a loss of limited liability?

Having identified those common qualities, may counsel rely, with impunity, upon the articles of partnership to determine the presence of the common qualities above enumerated, or must he concern himself with the real operation of the partnership; and if the latter, for what period of time? Would not the period of time during which the cause of action arose be critical? Or because he is looking for the true nature of the entity under consideration to determine these common qualities, must he concern himself with how the partnership has been operated since its inception? Operation on the date of filing suit, is yet another possibility, for that is the date on which jurisdiction is determined. Can he determine, on that single day, the extent of limited partner participation in the ownership, management, administration, or benefits of the partnership?

In the Arkoma partnership, the general partners own one per cent of the assets, the limited partners the rest, and the administration of the partnership is certainly not uninhibited. Of course, these facts may be gleaned from the partnership articles, but an inquiry into the actual operation of the partnership may reveal an entirely different array of restrictions.

Even if counsel can glean from these circumstances a group of common qualities which allow him to "identify clearly" a class of members who possess these qualities; and even if he can satisfy himself, from a careful analysis of the partnership documents and activities, that he has clearly defined general partners, it will nevertheless remain a mystery, how, even under these circumstances, he can exclude from the realm of real parties in interest, persons who actually own all or a portion of the partnership assets. The lowliest urchin in the street, if asked, would affirm without equivocation, that a fee owner of a portion of the partnership assets is a real party in interest when those assets are at risk. The Fifth Circuit should not have held otherwise, particular in the face of *Great Southern*.

The only course that works; the only course that has a foundation in law and equity; the only course that is predictable; is the one now charted by this Court. Insofar as corporations and unincorporated associations are concerned, counsel may determine citizenship prior to filing litigation, in most cases, by a letter to the state's secretary, the response to which identifies the incorporated or unincorporated nature of the entity with which he is dealing. That is the rule established by *Great Southern* and reaffirmed in *Navarro*. That is the rule enunciated in *United Steelworkers* in which this Court subjoined the opinion that if the rule need be changed, it is within the province of the legislature only to change it. There is no reason to depart from such sound reasoning.

CONCLUSION

The decisions of the Fifth Circuit in *Lee*, supra; *Mesa*, supra; and the present case; conflict with the jurisprudence of this Court in *Chapman*; *Great Southern*; *United Steelworkers*; and *Navarro*.

The test sought to be adopted by the Fifth Circuit is unworkable.

The citizenship of all non-juridical unincorporated associations is that of all of its members. Such citizenship in this case is not diverse from that of opposing parties.

Federal courts have no jurisdiction to hear this case.

Respectfully submitted,

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APPENDIX

Calculation of the Weighted Average Dumping Margin

The weighted average dumping margin is calculated by compiling the results of all sales examined, both those made at fair value and those made at LTFV. Only if the weighted average margin is more than *de minimis* will Commerce subject a company, or country, to an anti-dumping duty order. Thus, through the calculation of the weighted average dumping margin, Commerce considers all of the evidence in front of it in determining whether the class or kind of merchandise is being, or is likely to be, sold at LTFV.

In this context, it is useful to recall how the Department actually calculates margins, to show how the Department ultimately decides whether a class or kind of merchandise is being dumped, or is likely to be dumped.

The foreign market value is compared to the U.S. price of the sales being examined that the foreign producers/exporters made to U.S. purchasers during the six-month period of investigation. In order to make comparisons, Commerce converts the foreign market value into U.S. dollars. After conversions are made, the converted foreign market values are compared to the U.S. prices.

For any transaction for which the U.S. price is greater than the foreign market value, the dumping margin is zero. For any transaction for which the foreign market value is greater than the U.S. price, the dumping margin is the difference between the foreign market value and the U.S. price divided by the U.S. price. The following table illustrates the practice:

Transaction Number	U.S. Price	Foreign Market Value	Margin of Dumping
1.	1.50	2.20	46.7%
2.	2.20	2.20	0.0
3.	2.40	2.20	0.0
4.	2.00	2.20	10.0%

After these transaction-by-transaction dumping margins have been calculated, the Department calculates a weighted average dumping margin for each of the foreign producers/exporters, as follows:

Transaction Number	(a) Margin of Dumping	(b) Total Value of Transaction	(a) x (b) / 100
1.	46.7%	$ 900	420.30
2.	0	$1000	0
3.	0	$ 200	0
4.	10.0%	$1200	120.00
		$3300	$540.30

Weighted average Margin of Dumping = $\frac{540.30}{3300.00}$ X (100) = 16.4%

If the weighted average dumping margin is 0.5 percent or greater for any company, then the Department makes an affirmative determination of less than fair value sales. If the weighted average margin for any company is less than 0.5 percent, the Department considers this to be *de minimis*, and will exclude those companies with *de minimis* margins upon receipt of timely requests for exclusion.

[redacted]

[redacted] L. LIMES,
[redacted] COMPANY,

Petitioners,

[redacted]

ARKOMA ASSOCIATES,

Respondent.

[redacted]

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QUESTION PRESENTED FOR REVIEW

Whether diversity jurisdiction is destroyed if a limited partner of a plaintiff limited partnership is a citizen of the same state as the defendants.

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No. 88-1476

In The

Supreme Court of the United States

October Term, 1988

C.T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. art. III, §2, which states in pertinent part: "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States."

STATEMENT OF THE CASE

Respondent amends petitioners' statement of the case to include the following:

The case was tried on the merits, judgment was rendered in favor of Arkoma, and the complaint of intervention filed by Magee Drilling Company was dismissed.

SUMMARY OF ARGUMENT

Diversity jurisdiction derives from Article III of the Constitution and was first vested in the federal courts by the Judiciary Act of 1789. Diversity jurisdiction has evolved from the requirement of "complete diversity" in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), to the grant of entity status to corporations for diversity purposes in 28 U.S.C. §1332(c).

Just as the Supreme Court's treatment of corporations for jurisdictional purposes has evolved, so has the Court's examination of different types of unincorporated associations. In *Chapman v. Barney*, 129 U.S. 677 (1889), and *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900), the Court held that because these unincorporated associations were not corporations, the citizenship of each of their members must be considered for purposes of diversity jurisdiction. Approximately thirty years later, the Supreme Court was faced with a different type of unincorporated association in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). In *Russell*, the Court examined the *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, and determined that the

sociedad's characteristics were so similar to that of a corporation that the *sociedad* would be granted entity status for purposes of diversity jurisdiction.

Approximately thirty years after *Russell*, the Supreme Court examined the citizenship of a labor union in *United Steelworkers of America, ALF-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965). The Court held that the citizenship of all of the members of the union would be considered for purposes of diversity jurisdiction because the national as well as local flavor of the labor union made it difficult to fashion a test for determining its citizenship.

Just nine years ago, the Supreme Court in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), examined yet another type of unincorporated association, a business trust. The Court reviewed the features of the trust and determined that only the citizenship of the trustees would be considered because, given their degree of control in the trust, they were the real parties to the controversy.

The modern limited partnership is a unique unincorporated association in that it is formed by compliance with statutory requirements and has its basis in a uniform act which has been codified in forty-nine states (Louisiana incorporates components parts). The Uniform Limited Partnership Act imposes certain limitations upon limited partners who wish to retain their limited liability while, at the same time, granting all of the powers of management and control to the general partners.

Because of certain financial advantages, the modern limited partnership has emerged as an alternative to the public corporation. Many limited partnerships consist of

hundreds or thousands of limited partners, are registered with the Securities and Exchange Commission, and traded in public markets. Limited partnerships are used as investment vehicles because of their unique ability to utilize various tax losses and deductions generated by the limited partnership to offset income from other sources. Limited partnerships have been involved in a wide range of ventures encompassing almost every type of business undertaking.

The modern limited partnership is significantly different than the unincorporated associations found in the early cases of *Chapman* and *Great Southern* and the labor union in *Bouligny*. However, the modern limited partnership enjoys significant similarity to corporations, the *sociedad* in *Russell*, and the business trust in *Navarro*. Because the modern limited partnership has a functionally similar structure to other types of organizations that have access to federal courts, basic fairness and substance over form require that limited partnerships receive similar treatment.

The reasons for diversity jurisdiction, avoidance of local prejudice to out-of-state litigants, availability of federal procedural advantages, achievement of uniformity of decision in commercial law, conflicts of law, and international law, are distinctly applicable to the modern limited partnership. Therefore, the modern limited partnership should be granted citizenship for diversity purposes either as an "entity" by using the rationale set forth in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854), or by considering only the citizenship of the

general partners under the real parties to the controversy test set forth in *Navarro*.

Analysis of the Limited Partnership Agreement of Arkoma Associates, an Arizona limited partnership governed by the Uniform Limited Partnership Act (1976) which that state has adopted, mandates that under the application of the real parties to the controversy test, the general partners constitute such real parties for purposes of diversity jurisdiction. The limited partnership agreement provides that the general partners have exclusive and complete management and control of the operations of the partnership and have the power to do anything necessary to further the purposes of the partnership. Conversely, the limited partners do not have the right to control, manage, or transact any business for the partnership or the power to sign for or bind the partnership in any business transactions. Even though the limited partners do possess certain non-managerial rights, these are negligible when compared to the overwhelming scope of control maintained by the general partners. Accordingly, only the general partners are the real parties to the controversy and only their citizenship should be considered for purposes of determining diversity jurisdiction.

ARGUMENT

I. HISTORY OF DIVERSITY JURISDICTION

Specific authority for diversity jurisdiction derives from Article III of the Constitution, which provides, *inter alia*, that "[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States." U.S.

Const. art. III, §2. Diversity jurisdiction was first vested in the federal courts by the Judiciary Act of 1789. This Act, passed by the First Congress, provided for federal jurisdiction if a "suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, (1789-1799). Unfortunately, Congress failed to define the term "citizen" which, to this day, remains a source of controversy.

The first case to address the issue of diversity jurisdiction was *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806) which required "complete diversity" among "citizens" of different states. The conclusion reached by most courts and commentators is that "complete diversity" is not a constitutional mandate. *See, e.g.*, American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, §1301(b)(2), Supporting Memorandum A (1969) and *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (both supporting conclusion that *Strawbridge* did not hold that the Constitution requires complete diversity). This conclusion is based on a comparison of the language between the Judiciary Act of 1789 and the Constitution. The texts differ in a crucial aspect: "the statute spoke of 'the suit' being between diverse citizens, the Constitution of 'controversies' between them. The former might . . . be read to require 'complete diversity' in the entire suit, while the latter [merely] authorized Congressional conferral of jurisdiction over any case containing a controversy between citizens of different states." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Court*, Supporting Memorandum A at 427.

As further evidence that the "complete diversity" concept is not constitutionally based, Congress has made statutory exceptions to the "complete diversity" rule, as in the case of statutory interpleader,[1] which "has been uniformly construed to require only 'minimal diversity,' that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens." *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. at 530 (footnote omitted).

Furthermore, Rule 23 of the Federal Rules of Civil Procedure also permits an escape from the demands of complete diversity. If the parties comprise an appropriate class, only the citizenship of the named representatives of the class will be considered, even though the citizenship of other members of the class would destroy complete diversity. *See* C. Wright, *The Law of Federal Courts* 306, 314-15 (2d ed. 1970).

Finally, in the case of ancillary jurisdiction, federal courts may decide a controversy without reference to the citizenship of the ancillary parties, although neither the Constitution nor the statutes confer such jurisdiction. *Id.* at 19.

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[1] 28 U.S.C. §1335 (1982). Rule 22 of the Federal Rules of Civil Procedure defines "interpleader" as follows:

> (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . .

Since neither the Supreme Court nor Congress has addressed the issue of the citizenship of limited partnerships, it is necessary to first examine the historical treatment of corporations and unincorporated associations. The Supreme Court first considered the problem of corporate citizenship in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). Three years after its decision in *Strawbridge*, this Court held that although a corporation, as a distinct legal entity, was not a citizen within the meaning of the Constitution or the Judiciary Act, it could invoke diversity jurisdiction on the basis of the citizenship of its individual corporate shareholders. If the citizenship of all of the shareholders was different than the citizenship of any opposing party, the corporation could litigate in federal court. *Id.*

With the growth of interstate commerce and the increase in the number of corporations and shareholders, the requirement of complete diversity for all shareholders effectively precluded many corporations from invoking the diversity jurisdiction of the federal courts. Responding to that problem and noting the widespread criticism of the *Strawbridge* and *Deveaux* decisions, the Supreme Court, in *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), held that for jurisdictional purposes, a corporation was an artificial entity and should be deemed a citizen of the state of its incorporation. The Court's theory of corporate citizenship evolved further in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854). There, the Court created the fiction that, although a corporation was not considered a citizen for diversity purposes, its shareholders would be conclusively presumed to be citizens of the incorporating

state. The Court noted that although a corporation is not itself a citizen, one who deals with a corporation does not deal with a "mere metaphysical abstraction," but with directors and officers, the representatives of the shareholders. *Id.* at 327. The Court then addressed the propriety of determining jurisdiction on the basis of the citizenship of the shareholders who exercise no control over the litigation:

> [R]epresentatives of numerous unknown and ever-changing associates should [not] be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat . . . [jurisdiction]. It is true that these stockholders are corporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators.

Id. at 328.

Although the reasoning of *Marshall* differed somewhat from that of *Letson*, the result reached was identical and corporations were deemed to be citizens of the state of their incorporation.[2]

The *Marshall* rule was codified by Congress over 100 years later in 1958 and now appears in 28 U.S.C. §1332(c) (1982). When discussing this statute, the Senate Judiciary Committee stated: "It is now an established doctrine that a corporation, for the purposes of jurisdiction, is

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[2] Apparently, the Court was not concerned that its decision touched a constitutional note or that it was stepping on congressional toes as it undertook to interpret *Strawbridge* without a constitutional argument or amendment.

deemed a citizen of the State in which it is incorporated." S. Rep. No. 1830, 85th Cong., 2d Sess. 5, *reprinted in* 1958 U.S. Code Cong. & Ad. News 3099, 3101. Thus, Congress adopted the "entity"[3] theory for corporations and recognized the power of the courts to interpret the citizenship of organizations in the absence of a definitive statute. Furthermore, there is no suggestion in the legislative history of the 1958 amendment that Congress desired to preclude adoption of an "entity" theory for business entities other than corporations. *See generally id.* Absent congressional preclusion, the federal courts are free to determine whether certain types of unincorporated associations should be deemed "citizens" for diversity purposes. *See Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Arbuthnot v. State Auto. Ins. Ass'n*, 264 F.2d 260 (10th Cir. 1959); *American Fed'n of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954), *cert. denied*, 348 U.S. 873 (1954). Congress, of course, remains free to restrict or modify any judicial extensions which it deems unwise. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 344-45 (1943), *reh'g denied*, 320 U.S. 214 (1943) (Frankfurter, J., dissenting) (Congress, not the Court, has discretion to restrict

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[3] The "entity" theory, developed in *Letson* and *Marshall* and codified in 28 U.S.C. §1332(c) regarding corporations, provides the basis for treating a business organization as a separate citizen for purposes of diversity jurisdiction. On the other hand, the "aggregate" theory, sometimes referred to as the "persons composing" theory set forth in *Chapman* and *Great Southern, infra* pp. 11-12, requires that the citizenship of each member of certain unincorporated associations be considered to determine diversity jurisdiction.

diversity jurisdiction). While the Supreme Court and Congress have set out precise guidelines to determine the citizenship of corporations, the rules surrounding unincorporated associations are not as clear.

As the universe of unincorporated associations contains several distinct and different variations thereof, commercial reality and policy considerations require a separate examination and determination for each type of entity. *Chapman v. Barney*, 129 U.S. 677 (1889), has been labeled the leading case construing the citizenship of a 19th century unincorporated association. In *Chapman*, the Supreme Court held that a joint stock company,[4] even though it could bring a lawsuit in the name of its president, could not be a citizen of the State of New York for diversity purposes. The Court failed to examine the characteristics of the stock company to determine whether it qualified under the *Marshall* rationale. Rather, the Court reasoned that since state law did not label the joint stock company a corporation, it did not qualify for entity treatment. *Id.*

Over a decade later, the Supreme Court appeared to affirm *Chapman* in *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900). In *Great Southern*, the Supreme

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[4] A joint stock company is a capital-pooling privately formed entity which, like a corporation, has centralized management and transferrable shares. However, unlike a corporation, a joint stock company is an entity formed pursuant to agreement of the parties rather than by grant of authority by its state of organization, and it does not provide limited liability for its members which consist of only one class. *See* J. Crane & A. Bromberg, *Law of Partnership* 178-81 (1968). *See also Wroblewski v. Brucher*, 550 F.Supp. 742, 751 (W.D. Okla. 1982).

Court applied the *Chapman* reasoning to what was then called a "limited partnership association."[5] Writing for the majority, Justice Harlan held that the *Great Southern* limited partnership association was not a corporation under the law of its state of organization, and that its capacity to sue in the association's name did not serve to qualify the association as a corporation. Consequently, the Court relegated the *Great Southern* type limited partnership association to aggregate treatment. *Id.*

In 1933, the Supreme Court encountered another form of unincorporated association in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). *Russell* addressed the question of whether a *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, could be treated as a citizen for purposes of diversity. The Court examined the *sociedad*'s essential characteristics in light of the law under which the association was created. The Court then determined that those features entitled it to treatment similar to that given to corporations for diversity purposes. The *Russell* Court distinguished *Chapman* and *Great Southern* by suggesting that the associations in those cases lacked sufficient legal personality

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[5] A limited partnership association, like a joint stock company, had characteristics of both a corporation and a partnership. Like the joint stock company in *Chapman*, the limited partnership association in *Great Southern* had centralized management and transferability of shares. However, unlike the modern limited partnership, the limited partnership association in *Great Southern* had only one class of partner. Each partner subscribed to part of the capital and none had personal liability for the association's debts. *See generally* J. Crane & A. Bromberg, *Law of Partnership* at 151-53. *See also Wroblewski v. Brucher*, 55 F.Supp. at 751.

and, therefore, were undeserving of characterization as entities for purposes of diversity jurisdiction. *Id.* In its comparison of the *sociedad* to a corporation, the Court found many characteristics of the *sociedad* important.[6]

Russell reveals that the Supreme Court will examine each form of unincorporated association to determine how the citizenship of that organization should be determined for diversity jurisdiction purposes. *Russell* rejected the notion that *Chapman* requires the citizenship of each member of all unincorporated associations to be considered for diversity jurisdiction purposes. Also, *Russell*

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[6] [The *sociedad*] may contract, own property and transact business, sue and be sued in its own name and right. Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. It is created by articles of association filed as public records. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. Its members are not primarily liable for its acts and debts, and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them, this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states.

Id. at 481 (citations omitted).

reflects the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship. *Id.*[7]

United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) was the next Supreme Court decision to deal with yet another type of unincorporated association, a labor union. After studying the particular unincorporated entity involved, the Supreme Court, in *Bouligny*, held that a labor union should not be treated like the *sociedad* in *Russell* but rather like the joint stock company in *Chapman* and the limited partnership

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[7] In *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964), the Second Circuit interpreted *Russell* as a departure from the "label denominating tradition" of *Chapman*. *Id.* at 399. The court held that a joint stock association, organized and existing under New York law, was a citizen of that state for purposes of federal diversity jurisdiction. The court explained:

> It is our considered judgment . . . that the Supreme Court has abandoned the artificial and mechanical rule of Chapman v. Barney in favor of a more flexible test for capacity for citizenship, a test which demands that consideration be given to whether an organization's essential characteristics sufficiently invest it, like a corporation, with a complete legal personality distinct from that of the members it represents. And as we are convinced that a New York joint stock association such as this defendant has been legally endowed with essential characteristics that make it resemble a corporate entity much more than a mere aggregation of individuals, we reverse.

Id. at 393.

association in *Great Southern*. Because of the difficulty in trying to determine the citizenship of labor unions that have local as well as national flavor, the Court was unable to grant entity status to the labor union involved and reserved that determination for Congress. *Id.*[8]

The Court's discussion of the limitations of the judicial role in *Bouligny* can be restricted to the facts of the case. First, the Court's discussion of the difficulty of fashioning a test for labor union citizenship explains why the Court felt that only Congress could extend entity citizenship to labor unions. Second, while the *Bouligny* Court twice referred to *Mason*,[9] it never expressly discredited the *Mason* holding, thus limiting *Bouligny* to labor unions. Third, the Court's deference to Congress is understandable because of the great body of federal labor law created by Congress.

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[8] *Bouligny* has been criticized because Justice Fortas failed to explain why the Court, which historically had figured so prominently in the interpretation and application of the diversity jurisdiction provisions, felt constrained to defer to Congress on the issue of labor union citizenship. As one commentator has observed:

> In view of the Court's initial willingness to find a niche for corporations in the diversity statute this deference to Congress is remarkable. The application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function, and the Court's refusal to decide constituted a decision against jurisdiction without considering the relevant arguments.

Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 35 (1968).

[9] *Mason, supra* note 7, at 14.

The next and most recent Supreme Court case to address the issue of citizenship of an unincorporated association was *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980). In *Navarro*, the Court examined the citizenship of an express business trust[10] created under New York law. It held that the citizenship of the trustees, rather than that of the beneficiaries would control. The Court found that the fact that the trustees were the real parties to the controversy was particularly relevant in determining diversity jurisdiction. *Id.*

The Court applied its long standing rule[11] that only the citizenship of those who are "real and substantial

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[10] A business trust is a voluntary association which possesses many of the attributes of a corporation without formal incorporation and its attendant statutory regulation. The Supreme Court has defined the business trust as:

> a form of business organization . . . consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided.

Hecht v. Malley, 265 U.S. 144, 146-47 (1924).

[11] The real parties to the controversy terminology first appeared in *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421 (1823). Addressing the issue of joinder of parties in a suit involving actions by a trustee allegedly constituting a breach of trust, the *Wormley* Court stated:

(Continued on following page)

parties to the controversy" determines diversity jurisdiction. *Id.* at 460. It held that the citizenship of the beneficial shareholders, who retained severely restricted powers of intervention and control, was irrelevant, and that the trustees possessed the right to invoke the diversity jurisdiction of the federal court on the basis of their own citizenship. *Id.*

The Court implicitly refused to extend its decision beyond this particular type of unincorporated association. However, despite this limitation to business trusts, the majority's interpretation of the real parties to the controversy doctrine is applicable to determinations of diversity jurisdiction involving other unincorporated associations, including modern limited partnerships. The Supreme Court in *Navarro* made no comment on the specific issue of the citizenship of limited partnerships. However, the Court acknowledged that determining the identity of the real parties to the controversy before diversity of citizenship can be decided was hardly novel:

> Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds

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> This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.

Id. at 451 (footnote omitted). *See also Susquehanna & Wyo. Valley R.R. & Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1871); *Marshall*, 57 U.S. (16 How.) at 328-29; *McNutt v. Bland*, 43 U.S. (2 How.) 9, 15 (1844).

> jurisdiction must be real and substantial parties to the controversy. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Id. at 460-61. (citations omitted).

Applying the real parties to the controversy test, the Supreme Court concluded "that these respondents are active trustees whose control over the assets held in their names is real and substantial. . . . They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy." *Id.* at 465.

Justice Blackmun dissented from the opinion of the Court but noted that he only disagreed with the result of the real parties to the controversy analysis, not the analytical approach. *See id.* at 466-77. Justice Blackmun also indicated that he found the Fifth Circuit's reasoning persuasive in distinguishing *Bouligny* and other cases:

> The Court of Appeals in this case recognized the pertinence of Bouligny to the problem presented here, but found that case distinguishable. It noted that Bouligny is directly applicable only to the situation in which an unincorporated association seeks to establish diversity jurisdiction as an entity. And it adopted the view, earlier suggested in law review commentary, that Bouligny did not decide who the relevant members are when a court determines the citizenship of an unincorporated association. The Court of Appeals concluded that when an organization has more than one class of members, it is necessary to determine on a case-by-case basis which class comprises the real parties in interest. . . . I believe that the approach of the Court of Appeals in this case was consistent with this Court's prior decisions.

Id. at 474-75 (Blackmun, J., dissenting) (footnote and emphasis omitted).

While the *Navarro* majority did not mention the Fifth Circuit's[12] analogy between the business trust involved in the case and a limited partnership, the Court did not reject the position that the business trust shares some of the same attributes as a limited partnership. Furthermore, in affirming the reasoning of the Fifth Circuit, the Supreme Court did not indicate that its real parties to the controversy rationale would be limited to business trusts and not applied to limited partnerships. Additionally, application of a real parties analysis to limited partnerships, in which the rights and responsibilities of the general partners and limited partners are statutorily defined, would be less complicated than applying that test on a case-by-case basis to contractually organized business trusts such as the one found in *Navarro*. *See* Note, *Who are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 Wash. U.L.Q. 1051, 1065 (1984).

II. DIVERSITY JURISDICTION AND THE MODERN LIMITED PARTNERSHIP

The first appellate court to address the issue of citizenship of a modern limited partnership was the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178

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[12] *See Lee v. Navarro Sav. Ass'n*, 597 F.2d 421, 425 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980).

(2d Cir. 1966), *cert. denied*, 385 U.S. 817 (1966).[13] In *Colonial Realty*, the court acknowledged the rule established in *Great Southern*, but concluded that only the citizenship of the general partners was relevant for purposes of determining diversity jurisdiction. Judge Friendly, writing for the court, based his conclusion on a provision of the New York Partnership Law identical to the Uniform Limited Partnership Act which provided that a limited partner was not a proper party to proceedings by or against a limited partnership unless the suit was one to enforce the limited partner's rights against or liability to the partnership. *See* N.Y. Partnership Law §115 (McKinney 1978) (amended 1968). *See also* Uniform Limited Partnership Act §26 (1916). Because the New York statute provided that a limited partner lacked capacity to sue on behalf of the limited partnership, the court held that identity of citizenship between the plaintiff and a limited partner did not destroy jurisdiction properly founded upon complete diversity between the plaintiff and each general partner. *Id.*

In *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986), the Fifth Circuit followed the reasoning set forth by this Court in *Navarro* and the result in *Colonial Realty* and held that only the citizenship of the general partners was relevant to determine diversity jurisdiction. While the Fifth Circuit applied the real parties to the controversy test set forth in

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[13] It is interesting to note that of all the cases dealing with the issue of citizenship of the modern limited partnership, this case is the only one in which an application for certiorari was filed with this Court.

Navarro, it recognized the concept set forth in *Colonial Realty* of "two distinct classes of members one of which has no place in the dispute" and acknowledged that both methods had "essentially the same reasoning under . . . different label[s]." *Id.* at 240-41. The *Mesa* court followed *Navarro* by distinguishing *Chapman* and *Great Southern* as "early cases" that were clearly concerned with entities which were quite different than the modern limited partnership with two separate and distinct classes of members. The court also distinguished *Bouligny* which dealt with the question of whether a labor union could itself be treated as a separate citizen for diversity purposes. Unlike *Mesa* and *Navarro*, the *Bouligny* labor union did not involve two separate classes of members that could be differentiated. The *Mesa* court also noticed that *Bouligny*, like the early cases, did not have a single class with exclusive control "based on contract (or statute) setting forth permanent rights, powers and obligations as granted to the trustees in *Navarro* and to the general partners here." *Id.* at 241. Finally, the *Mesa* court dismissed the concerns in other circuits that including only the citizenship of the general partners somehow expanded diversity jurisdiction without congressional authorization by claiming that such arguments were "more semantics than principles." *Id.* The Court concluded:

> An attempt to create a new type of citizen would, of course, expand jurisdiction. Here we are dealing only with which already extant citizens are involved in the case; the issue here is merely a necessary interpretation of existing law.

Id. at 241-42.

A majority of commentators and a large number of courts are in accord with the rule announced by the Second Circuit in *Colonial Realty* and followed by the Fifth Circuit in *Mesa*.[14]

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[14] *See* Note, *Who are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 Wash. U.L.Q. 1051 (1984); Note, *The Citizenship of Limited Partnerships for Purposes of Federal Diversity Jurisdiction*, 47 Cin. L. Rev. 301 (1978); Note, *Limited Partnerships in Diversity: The Effect of Rule 17(b) on Federal Jurisdiction*, 6 Fordham Urb. L.J. 271 (1978); Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 Tex. L. Rev. 243 (1978); Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. Chi. L. Rev. 384 (1978); Note, *Federal Jurisdiction – Diversity of Citizenship – The Citizenship of Limited Partners Must be Considered in Determining Whether Diversity Jurisdiction Exists – Carlsberg Resources Corp. v. Cambria Savings & Loan Association, 554 F.2d 1254 (3d Cir. 1977)*, 46 Geo. Wash. L. Rev., 657 (1978); Note, *Carlsberg Resources Corp. v. Cambria Savings & Loan Association: Diversity Jurisdiction and the Limited Partner*, 1 Det. C.L. Rev. 177 (1978); Note, *Federal Civil Procedure – Diversity Jurisdiction – Identity of Citizenship Between Defendants and some Limited Partners in Plaintiff Partnership Precludes Federal Jurisdiction Based on Diversity of Citizenship – Carlsberg Resources v. Cambria Savings & Loan Association, 554 F.2d 1254 (3d Cir. 1977)*, 27 Emory L.J. 165 (1978); Note, *Federal Courts – Diversity of Citizenship Jurisdiction – Limited Partnerships*, 16 Duq. L. Rev. 221 (1977-78); Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U.L. Rev. 661 (1977); Note, *Carlsberg Resources v. Cambria Savings & Loan Ass'n: Limited Partners and Diversity Jurisdiction*, 13 Tulsa L.J. 304 (1977). *See also Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970), *cert. denied*, 400 U.S. 993 (1971); *Petroleum Data Services, Inc. v. First City Bancorporation of Texas, Inc.*, 622 F.Supp. 1022 (D. Kan. 1985); *Westville Holdings, Inc. v.*

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However, the Third Circuit in *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977), explicitly rejected the *Colonial Realty* holding. The court based its decision on the *Chapman, Great Southern,* and *Bouligny* line of cases and regarded them as a mandate to include the citizenship of all members of all unincorporated associations. *Id.*

The *Carlsberg* holding was reaffirmed by the Third Circuit, post *Navarro,* in *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29 (3d Cir. 1981). The Fourth, Seventh, and Eighth Circuits also appear to follow the holding in *Carlsberg*. *See New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015 (4th Cir. 1985); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984); and *Stouffer Corp. v. Breckenridge*, 859 F.2d 75 (8th Cir. 1988). Those cases employed a "bright-line" test which classifies limited partnerships as unincorporated associations and requires consideration of the citizenship of all members for diversity purposes. That "approach

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American Petroleum Partners, 592 F.Supp. 44 (S.D.N.Y. 1984); *Wroblewski v. Brucher*, 550 F.Supp. 742 (W.D. Okla. 1982); *Sixth Geostratic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F.Supp. 297 (N.D. Okla. 1982); *Williams v. Sheraton Inns, Inc.*, 514 F.Supp. 22 (E.D. Tenn. 1980); *Rocket Oil & Gas Co. v. Arkla Exploration Co.*, 435 F.Supp. 1303 (W.D. Okla. 1977); *C.P. Robinson Const. Co. v. National Corp. for Housing Partnerships*, 375 F.Supp. 446 (M.D.N.C. 1974); *E ning v. Virginia Squires Basketball Club*, 349 F.Supp. 709 (E.D.N.Y. 1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); *Sands v. Geller*, 321 F.Supp. 558 (S.D.N.Y. 1971); *Garfield & Co. v. Wiest*, 308 F.Supp. 1107 (S.D.N.Y. 1970), *aff'd*, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

fails to recognize the unique character of . . . [modern] limited partnerships – neither corporation nor association, but a hybrid between the two." *Stouffer Corp. v. Breckenridge*, 859 F.2d at 78 (Ross, J., dissenting), *citing Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d at 240. *See also Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d at 1263 (Hunter, J., dissenting) (the modern limited partnership is "a unique business entity," and as such has "peculiar and distinct" characteristics).

The Third, Fourth, Seventh, and Eighth Circuits applied prior Supreme Court holdings limited to joint stock companies (*Chapman*), nearly ancient limited partnership associations (*Great Southern*), and labor unions (*Bouligny*).[15] The approach taken by these circuit courts of appeals fails to properly interpret the evolution of this Court's holdings in *Chapman, Great Southern, Bouligny, Russell,* and *Navarro* with respect to the treatment of different types of unincorporated associations.

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[15] Furthermore, *Chapman* and *Great Southern*

> stand only for the rule that unincorporated common law business associations with only one class of members, all of whom may participate in the management of the business, are citizens, for diversity purposes, of all the states wherein their members are citizens. But these cases have no application to members of a second class within the association who cannot participate in the management of its business.

Wroblewski v. Brucher, 550 F.Supp. at 751.

III. THE MODERN LIMITED PARTNERSHIP – A SOPHISTICATED BUSINESS ENTITY – A COMPARISON TO OTHER TYPES OF BUSINESS ENTITIES

A limited partnership is formed by compliance with statutory requirements.[16] It consists of (a) general partners who manage the business and have the same liability as partners in an ordinary partnership and (b) limited partners, who do not take part in management, but who share profits, although not losses beyond their capital contributions. Furthermore, a limited partner may forfeit his limited liability by taking part in the control or management of the limited partnership. *See* J. Crane & A. Bromberg, *Law of Partnership* at 143. The Uniform Limited Partnership Act (1916) imposes the following limitations upon limited partners: "A limited partnership is a partnership formed by two or more persons . . . having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership." Uniform Limited Partnership Act §1 (1916); "The surname of a limited partner shall not appear in the partnership name, unless. . . ." *Id.* at §5(1); "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." *Id.* at §7; "A contributor, unless he is a general partner, is not a proper

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[16] Every state (except Louisiana which incorporates component parts) has adopted either the Uniform Limited Partnership Act (1916), the Uniform Limited Partnership Act (1976), the Uniform Limited Partnership Act (1976) (amended 1983), or the Uniform Limited Partnership Act (1976) (amended 1985).

party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or a liability to the partnership." *Id.* at §26.

The Uniform Limited Partnership Act (1976) (amended 1983) imposes the following limitations upon limited partners: "The name of each limited partnership as set forth in its certificate of limited partnership: (2) may not contain the name of a limited partner unless. . . ." Uniform Limited Partnership Act §102(2) (1976) (amended 1983); "Except as provided in Subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. *Id.* at §303(a); "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* at §1001.

The Uniform Limited Partnership Act (1976) (amended 1985), contains the same substance as the 1976 Act with the 1983 amendments except that the language of section 303 has been slightly modified.

Limited partnerships have become an important aspect of our business society. The publicly traded limited partnership, a form of limited partnership, has emerged as a financial alternative to the public corporation. "[A] publicly traded limited partnership is an operating business or a pool of assets in a partnership form registered with the SEC and traded in public markets."

Publicly Traded Limited Partnerships: An Emerging Financial Alternative to the Public Corporation, 39 Bus. Law. 709-10 (1984). The public limited partnership is currently popular because it addresses valuation mismatches that have occurred when dealing with corporations. Public limited partnerships are part of a larger trend and have been referred to by one commentator as the "devolution of corporate assets into direct ownership." *Id.* at 710. From 1974 to 1984, over forty-seven billion dollars worth of public limited partnerships had been filed with the National Association of Securities Dealers. *Id.* at 717. Many limited partnerships consist of hundreds or thousands of limited partners. The sole purpose of this type of entity is to raise capital. Members of the partnership have no idea who the other limited partners are and have no reason to care. Furthermore, third parties do not know the identity of the limited partners and have no reason to know because limited partners are only considered for the capital they contribute. *Id.* at 733.

Limited partnerships are used as investment vehicles because of their ability to utilize various tax losses and deductions generated by the partnership to offset income from other sources. *See* Aslanides, Cardinali, Haynsworth, Lane and Niesar, *Limited Partnerships – What's Next and What's Left?*, 34 Bus. Law. 257, 258 (1978). Limited partnerships have been involved in ventures including real estate development; oil and gas drilling; farming operations, including vineyards, fruit, and nut groves; timber development; cattle raising and feeding operations; sheep ranching; chinchilla breeding; oyster farming; theater, film, and television productions; sports

franchises; equipment leasing; venture capital companies; individual and chain restaurants; hotels and motels; estate planning; and research and development companies during the period in which they are operating at a loss.

> "[L]imited partnerships can be appropriate for any type of operating business where the success of the venture is not dependent on retaining large operating profits in the business for further expansion or in the formative stages before a particular business becomes too profitable to justify the use of the partnership form due to the tax situation of the individual partners."

Id.

As mentioned above, the modern limited partnership is significantly different than the unincorporated associations examined in the early cases. The joint stock company in *Chapman* and the limited partnership association in *Great Southern* were merely voluntary associations comprised of "mere collections of individuals" who also had the power to "sue in their collective name." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 461. The unincorporated associations in these early cases were not statutorily created and had only one class of partner. Clearly the modern limited partnership is significantly different. It contains two separate and distinct classes of members, one of which has near exclusive control of the assets and the legal and business decisions.

The modern limited partnership is also quite different than the labor union in *Bouligny*. In *Bouligny*, as in *Chapman* and *Great Southern*, there was no separate class of member with exclusive control of the management and assets of the labor union. Unlike the modern limited

partnership, the labor union in *Bouligny* did not have a contract or statute which set forth permanent rights, powers, and obligations similar to those granted to general partners in the modern limited partnership. Furthermore, there were obvious problems in fashioning a test to ascertain the citizenship for the labor union because of its local and national flavor.

On the other hand, the modern limited partnership is quite similar to the corporation. Both shareholders and limited partners share in the profits but are subordinated to the claims of outside creditors. Both enjoy limited liability and both have delegated management of their interests to others. The only major practical differences between a modern limited partnership and a corporation are that the limited partnership is a less flexible form of investment because its purposes must be specifically delineated in its charter, and that the two forms of organizations enjoy significantly different tax treatment. However, many corporations are taxed like partnerships if they satisfy the criteria of Subchapter S of the Internal Revenue Code, I.R.C. §§1361-79 (1986).

The courts have noted that the characteristics of limited partners make them significantly more like shareholders than general partners. *See, e.g., Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965); *Ruzicka v. Rager*, 305 N.Y. 191, 197-98, 111 N.E.2d 878, 881 (N.Y. 1953).

The modern limited partnership is also similar in many ways to the business trust. Some of the elements of control that might cause a limited partner to become a general partner and lose his limited liability might also

cause a beneficial shareholder to become a principal of the trust and lose his limited liability. *See* R. Rowley & D. Sive, 2 *Rowley on Partnership* 633 (2d ed. 1960).

The powers of the trustees are very similar to those of general partners in a limited partnership. In *Navarro*, the Court found that the trustees of the business trust "ha[d] legal title; they manage[d] the assets; they control[led] the litigation." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 465. Article III of the Declaration of Trust gave the trustees the "full, absolute and exclusive control and authority over the Trust Estate and of the business and affairs of the Trust. . . ." *Lee v. Navarro Sav. Ass'n*, 597 F.2d at 424. General partners also manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts. *See generally* Uniform Limited Partnership Act (1916) and Uniform Limited Partnership Act (1976).

Conversely, the beneficial shareholders in *Navarro*'s trust "had no voice in the initial investment decision . . . [could not] control the disposition of . . . [the] action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 464-65. (footnote omitted). Similarly, limited partners have limited control over the partnership, cannot bring an action on behalf of the partnership unless it is a derivative action in which the partners have refused to act, and have limited liability. *See generally* Uniform Limited Partnership Act (1916) and Uniform Limited Partnership Act (1976).

The modern limited partnership is also similar in many respects to the *sociedad en comandita*. *Compare* "Its

members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §26 (1916) and Uniform Limited Partnership Act §1001 (1976) (the limited partner does not have authority to bring suit on behalf of the limited partnership except in extraordinary circumstances). *Compare* "It is created by articles of association filed as public records." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(b) (1916) and Uniform Limited Partnership Act §201(a) (1976) (requiring certificate to be recorded). *Compare* "Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(a)V, §20 (1916) and Uniform Limited Partnership Act §201(b), §801 (1976) (period of limited partnership's duration). *Compare* "Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(a)IV (1916) and Uniform Limited Partnership Act §201(a)(3) (1976) (certificate must designate general partners); and Uniform Limited Partnership Act §9, §10 (1916) and Uniform Limited Partnership Act §§301-405 (1976) (rights of general and limited partners). *Compare* "Its members are not primarily liable for its acts and debts. . . ." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §7 (1916) and Uniform Limited Partnership Act §303 (1976) (limited

liability of limited partners). *Compare* "[I]ts creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §22, §23(1)(a) (1916) and Uniform Limited Partnership Act §502(b), §607, §703, §804 (1976) (preferred status of creditors of limited partnership).

IV. POLICY CONSIDERATIONS

The legislative history concerning the adoption of diversity jurisdiction in both the Constitution and the Judiciary Act of 1789 is disappointingly scant. Some opposition to it was expressed even among the founding fathers, but little recorded rationale for its support has been preserved. *See* Friendly, *The Historic Basis Of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928). Chief Justice Marshall alluded to "fears and apprehensions" on the part of aliens or citizens of different states who would otherwise find themselves before state tribunals. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) at 87. Justice Storey mentioned "state prejudices, state jealousies, and state interests . . . " as reasons for diversity jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). *See also* J. Elliot, *The Debates on the Federal Constitution* (2d ed. 1859).

Reasons for diversity jurisdiction include: avoidance of local prejudice to out-of-state litigants by making available the benefits and safeguards of the federal

courts, encouragement of commercial investment, availability of federal procedural advantages, and achievement of uniformity of decision in commercial law, conflicts of law, and international law. *See generally* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* at 99-110, 458-64; Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928); Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1445-51 (1964); Note, *Federal Diversity Jurisdiction – Citizenship for Unincorporated Associations*, 19 Vand. L. Rev. 984, 987-89 (1966).

Limited partnerships are among those business organizations for which diversity jurisdiction was created as a protection. These organizations have a functionally similar structure with other types of organizations that have access to federal courts such as corporations, business trusts, and the *sociedad*. Considerations of basic fairness and substance over form require that limited partnerships receive similar treatment. Therefore, limited partnerships should be granted citizenship for diversity purposes either as an "entity" by using the *Marshall* rationale or by considering only the citizenship of the general partners under the real parties to the controversy rule set forth in *Navarro*. Furthermore, any arguments to the contrary based on judicial economy should be dismissed. The fact that certain federal courts may not want to take on a possibly increased workload is not a sufficient reason to restrict access to the federal courts. "Serious questions of judicial integrity would be raised if questions of workload and the size of the federal docket were given undue

emphasis in making jurisdictional determinations." Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U.L. Rev. at 672.

Because similar entities should receive similar treatment, this Court in *Navarro* sent a clear message that the federal courts are required to look beyond "the superficial contours of a business entity to define the real parties to the controversy." *Stouffer Corp. v. Breckenridge*, 859 F.2d at 78 (Ross, J., dissenting).

V. APPLICATION OF THE REAL PARTIES TO THE CONTROVERSY TEST TO THIS CASE

Arkoma Associates is an Arizona limited partnership, governed by the Uniform Limited Partnership Act which that state has adopted and which is substantially similar to the Uniform Limited Partnership Act (1976).[17] The Act provides, as a matter of law, that "a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or,

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[17] Petitioners try to attach significance to the fact that under Arizona law, Arkoma Associates is not a juridical person, having an existence separate and apart from its members. Brief of Petitioners, p. 10. As such, petitioners argue that Arkoma Associates cannot be considered a citizen of Arizona in the same way an Arizona corporation would be granted entity status. *Id.* However, this narrow view ignores the argument for the application of the real parties to the controversy test to determine diversity jurisdiction. Furthermore, this argument also assumes that this Court has already determined that a limited partnership may not be granted entity status like a corporation based on the reasoning developed in *Letson* and *Marshall* and codified in 28 U.S.C. §1332(c).

in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." Ariz. Rev. Stat. Ann. §29-318 (1982). The Act also limits a limited partner's right of action as follows: "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* at §29-356.[18]

Analysis of the Limited Partnership Agreement of Arkoma Associates[19] mandates that under the real parties

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[18] Petitioners argue that the Arkoma Associates' position is somehow weakened because Ariz. Rev. Stat. Ann. §29-326 (repealed 1982), which mirrored Uniform Limited Partnership Act §26 (1916), has been repealed. However, capacity to sue is but one element of control to be examined in the application of the real parties to the controversy test. Furthermore, Ariz. Rev. Stat. Ann. §29-356 provides limited partners with capacity to sue only in a derivative action whereby the limited partners bring an action on behalf of the limited partnership to recover a judgment in its favor if the general partners have refused to bring such an action or if an effort to force the general partners to do so would not likely succeed. Other than in this limited circumstance, the limited partners do not have the capacity to file suit on behalf of the limited partnership or to carry on any of the management functions conducted by the general partners. While Ariz. Rev. Stat. Ann. §29-356 arguably grants the limited partners somewhat greater access to the courts than granted in §29-326 (repealed 1982), it in no way empowers the limited partners with the right to control, manage, or transact any business for the partnership, the very factors that cause the general partners to be the real parties to the controversy.

[19] The Limited Partnership Agreement of Arkoma Associates and the amendments thereto appear in full on pages 70-97 of the Joint Appendix.

to the controversy test, the general partners constitute such real parties for purposes of diversity jurisdiction. Article 6.1 of the agreement provides that the general partners have exclusive and complete management and control of the operations of the partnership and have the power to do anything necessary to further the purposes of the partnership. Article 6.1(a) through (m) contains a non-exclusive list of those powers. In addition, article 6.3 grants the general partners specific authority to lease or sell any partnership property under such terms as the general partners deem proper. With regard to the accounting practices of the limited partnership, article 5.1 grants the general partners absolute discretion to select the method to be used to calculate depreciation of any depreciable assets of the partnership.

Petitioners argue that the citizenship of the limited partners should be considered for diversity jurisdiction purposes because they own ninety-nine percent of the assets of Arkoma and because "[t]hey may veto the sale of partnership assets and control the use of the proceeds of such sales." Brief of Petitioners, pp. 8-9. However, article 7.1 of the limited partnership agreement clearly provides that the limited partners do not have the right to control, manage, or transact any business for the partnership, or the power to sign for or bind the partnership in any business transactions. Article 7.1 also provides that the limited partners cannot be personally liable for any debts or losses of the partnership or of the general partners.

While the limited partners do compromise the majority interest of the partnership, petitioners' interpretation of their power to veto the sale of assets and to control the

use of those proceeds is overstated. In actuality, the limited partners have few significant rights and powers, none of which are related to the management of the limited partnership.[20]

The rights and powers granted to the limited partners are negligible when compared to the overwhelming scope of control maintained by the general partners. Furthermore, the rights and powers granted to the limited partners do not involve control or management of the limited partnership or the transaction of any business on behalf of the limited partnership. Those rights and powers are exercised exclusively by the general partners. Accordingly, the general partners are the only real parties to the controversy.

VI. RELIEF REQUESTED

Respondent Arkoma Associates respectfully requests this Court to affirm the judgment of the Fifth Circuit Court of Appeals based on either the entity status granted to a corporation and a *sociedad*, or the real parties to the controversy test applied by this Court in *Navarro*. In the alternative, should this Court reverse the Fifth Circuit Court of Appeals, respondent submits that the dismissal of intervenor Magee Drilling Company's complaint of intervention, as amended, should be affirmed on the grounds and for the reasons that complete diversity of citizenship existed between Magee Drilling Company,

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[20] *See generally* Limited Partnership Agreement of Arkoma Associates, articles 6.2(g), 7.3(a) and (b), 7.4, 8.1, 8.2, and 9.1(a) and (e). *Compare with* articles 6.1(a)-(m) and 7.1.

a citizen of the State of Texas, and all of the partners and limited partners of Arkoma Associates. *See* Second Certificate of Amendment to the Limited Partnership Agreement of Arkoma Associates, Joint Appendix, pp. 93-97. Federal courts have long held that an intervention will be treated as a separate action if it is permissive and there is an independent basis for jurisdiction of the intervenor's claim. 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §1917 at 457-59, §1920 at 491 (1986). *See also Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675-76 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union*, 718 F.2d 1341, 1351 (5th Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *McKay v. Heyison*, 614 F.2d 899, 907 (3d Cir. 1980); *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Alabama Electric Coop., Inc. v. United States*, 574 F.Supp. 27, 31 n. 8 (M.D. Ala. 1983); *Equal Empl. Oppor. Comm'n v. International Bhd. of Elec. Workers*, 506 F.Supp. 480, 483 (D. Mass. 1981); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66, 69 (W.D. Pa. 1979).

Thus, even under petitioners' theory of diversity jurisdiction, independent jurisdictional grounds existed for the complaint of intervention filed by Magee Drilling Company. These issues, along with all other issues, were tried to the district court (Joint Appendix, p. 67) and affirmed by the Fifth Circuit Court of Appeals (Joint Appendix, p. 69).

VII. CONCLUSION

Fundamental fairness and uniformity of treatment to similar entities mandate that Arkoma Associates, a modern limited partnership, have access to the federal courts through diversity jurisdiction. There is no logical reason to foreclose Arkoma Associates from such access. Because Arkoma Associates is analogous to a corporation and a *sociedad en comandita*, in order for diversity standards to be truly uniform, Arkoma Associates must be given the entity status granted to the corporation and the *sociedad*.

Alternatively, because Arkoma Associates is also analogous to a business trust, the real parties to the controversy test applied by this Court in *Navarro* should be applied in this case. Under such test, only the citizenship of the general partners of Arkoma Associates, the real parties to the controversy, would be considered for purposes of diversity jurisdiction.

Reliance on *Chapman* and *Great Southern*, turn of the century cases dealing with antiquated unincorporated associations, and *Bouligny*, clearly distinguishable because of the national as well as local flavor of its labor union, is no longer appropriate. Now is the time to grant the modern limited partnership the access to the federal courts through diversity jurisdiction that it deserves.

Respectfully submitted:

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No. 8[redacted]

In The

Supreme Court of the United States

October Term, 1988

C. T. CARDEN, LEONARD L. LIMES,
AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

ARGUMENT

The Jurisdictional Issue:

Respondent's discriminating selection of jurisprudence does not begin to refute the signal argument which

is dispositive of the issue before this Court, which may be paraphrased as follows:

In determining diversity jurisdiction, this Court has never disregarded the citizenship of each and every member of an association when the association did not have statutorily recognized status as a juridical person.

Both a corporation and a *sociedad en comandita* are juridical persons. The evolution of this Court's treatment of the former category, which occupies such a prominent role in Respondent's brief, does not alter this verity. In order to exclude the citizenship of any member, this Court, as early as *Marshall v. Baltimore & Ohio R. R. Co.*, 57 U. S. 314, 14 L. Ed. 953 (S. Ct.1854), recognized as decisive the presence of a "juridical person." *id.* at page 328.

Respondent argues as though this Court will not realize that the association which was the focus of *People of Puerto Rico v. Russell & Co.*, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (S. Ct. 1933) was a "juridical person" under the civilian laws of Puerto Rico, an entity separate and apart from its constituent members, capable of owning property, itself taxed as any other citizen; a distinction no more likely to be overlooked here than it was in *United Steel Workers of America v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965). There, this Court noted:

> The problem which it (*Puerto Rico*, supra) presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not . . . But this Court held that the *sociedad* itself, not its members, was the party, doing so on a basis which is no help to petitioner. It did so because, as Justice

> Stone stated for the Court, in '[t]he tradition of the civil law, as expressed in the Code of Puerto Rico, the *sociedad* is consistently regarded as a juridical person.' 228 U. S., at 480-481, 53 S. Ct., at 448-449.

(Parenthetical comment added). As clear as the *sociedad* was a juridical person, that is how clear it is that Respondent is not.

Respondent was formed under the laws of the State of Arizona. The issue then is whether Arizona partnerships (or even limited partnerships) are juridical persons. Both the Arizona statutes and the jurisprudence reflect that they are not.

The controlling statute defining the nature of a partnership is *Arizona Revised Statutes 29-206* which provides:

> A. A partnership is an association of two or more persons to carry on as co-owners a business for profit.
>
> B. . . .but this statute shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

In that the *Arizona Limited Partnership Act, Arizona Revised Statutes 29-301, et seq.*, does not contain any provisions similar to those of the Puerto Rican *Civil* and *Commercial Codes* providing juridical personality to a limited partnership, there is no basis in Arizona law to treat Arkoma as a juridical person. Therefore, Arkoma is an association whose citizenship is determined by that of all of its members.

An example of the civil law tradition in regard to partnerships, mentioned by this Court in *Puerto Rico*, is *Article 2801* of the *Louisiana Civil Code* which provides:

> A partnership is a juridical person, distinct from its partners, created by a contract between two or more persons . . .

Such a provision as *Article 2801* is absent from the law of Arizona. The entity status of a partnership is, therefore, an unprovided for case. *Section 29-363*[1] of the *Arizona Limited Partnership Act* (1982) provides:

> In any case not provided for in this act the provisions of the Uniform Partnership Act govern.

The *Arizona Partnership Act* by the same omission does not provide that a partnership is a juridical person. Therefore, one must look to its provisions regarding unprovided for cases which provisions are contained in *Section 29-205* which states:

> In any case not provided for in this chapter the rules of law and equity, including the law merchant shall govern.

Section 29-205 was interpreted in *Dolph v. Cortez*, 8 Ariz. App. 429, 446 P. 2d 939 (Ariz. App. 1968) in which the Court held:

> A. R. S. 29-205, 10 A.R.S., provides that, in situations not covered by the Uniform Partnership Act, the common law shall apply. The Act

[1] Although *Section 29-363* of the *Arizona Limited Partnership Act* was enacted in 1982, and Arkoma was allegedly formed August 31, 1981, *Section 29-364* provides that *29-363* shall effect existing partnerships.

> nowhere establishes a partnership as a legal entity such as is capable of suing or being sued in its own right. . . .

Respondent treats *Navarro Savings Association v. Lee, et al.*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980), as if it did not say:

> Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, *unincorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. Ed. 842 (limited partnership association) . . .

(Emphasis added); and as if it did not say:

> The Court has never analogized express trusts to business entities for purposes of diversity jurisdiction . . .

Navarro, supra, certainly does not stand for any proposition advanced by Respondent. It does not liken limited partnerships to business trusts. It does the opposite. It does not disregard the presence of a juridical person as a *sine qua non* of disregarding the citizenship of members. It insists upon it.

Respondent's arguments deal, instead, with the antiquity of *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 824 (S. Ct. 1900) ignoring the specific reaffirmation of that decision nine years ago in *Navarro*, supra; and with the change in treatment of corporations from the dawn of the nineteenth century until now; while ignoring two important distinctions: 1)

Respondent is not a corporation (or a juridical person of any kind); and 2) even now, corporate citizenship is not tied to "a class of members" (*Mesa*, infra) as Respondent contends for, but to the state of incorporation and principal place of business *of the corporation*, rather than its members. *28 U. S. C. 1332 (c).*

Nor does Respondent answer Petitioner's argument that the diversity rule suggested in *Mesa Operating Limited Partnership vs. Louisiana Intrastate Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986) (identifying clearly a class of members as the real party to a controversy) and contended for here by Respondent, is unworkable. Petitioners argued that such a rule could not possibly take account of limited partners who promote themselves outside of partnership records to the status of general partners by dint of their involvement in the affairs of the partnership. An essential distinction between limited partnerships and corporations, and one which is paramount in reflecting the extent to which the *Mesa* solution is unworkable, is that no corporate shareholder (or officer for that matter), can lose his shareholder status, and with it, limited liability, etc., by becoming involved in the administration of corporate affairs. Such is not the case with limited partners. No repository exists to which reference may be had by a prospective litigant to determine the members of that "clearly defined class" of people in charge which Respondent contends bear the name, general partners.

Nor do the Respondent's general partners "have exclusive and complete management and control of the operations of the partnership and have the power to do

anything necessary to further the purposes of the partnership" as stated at page 5 of Respondent's brief. To the contrary, the partnership articles reflect significant restrictions on the activities of the general partners with correspondent power in the so called limited partners (See Arkoma articles of partnership sections 6.2 and 6.3 [page 82 et seq., Joint Appendix]).

Respondent devotes significant attention to jurisdictional treatment of interpleader actions, which this case is not; to matters of ancillary jurisdiction, with which this case is not concerned; and to class actions, to which this case is foreign. Respondent discusses mammoth publicly held limited partnerships, to which category Respondent can never be equated even with the most grandiose delusions. Before this Court is a group of individuals purportedly gathering together under the auspices of the *Arizona Limited Partnership Act*[2] to turn a profit on what was left of drilling rigs they had purchased.

---

[2] The District Court held that Arkoma had substantially complied with *Section 29-302* (1973), the Arizona statute in effect when Arkoma was allegedly formed, which provided in pertinent part:

> A. Two or more persons desiring to form a limited partnership shall:
>
> 1. Sign and acknowledge a certificate, which shall state: . . .
>
> (d) The name and place of residence of each member; general and limited partners being respectively designated . . .

(Continued on following page)

Respondent descries a trend toward the expansion of diversity jurisdiction, to which Petitioners respond that if there is a trend, it is to narrow diversity jurisdiction rather than expand it. The statute under consideration is not the interpleader statute, *28 U. S. C. 1335*, or the class action rule, *Rule 23* of the *Federal Rules of Civil Procedure*, which Respondent discusses at length. It is instead *28 U. S. C. 1332* under which the required amount in controversy has not declined in recent years, it has quintupled.

(Continued from previous page)

(f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner . . .

(i) The share of the profits or other compensation by way of income which each limited partner shall receive by reason of his contribution.

2. File for record the certificate in the office of the county recorder of the county in which the principal place of business is situated.

Reference to Arkoma's articles of partnership (Transcript, Exhibit D-5, Joint Appendix page 70) discloses failure to comply with *Section 29-302* in the following respects:

1. The limited partners did not sign the articles;

2. The names and places of residence of the limited partners do not appear in the articles as of May 23, 1985, the date this suit was filed;

3. The amount of cash or other property contributed by the limited partners does not appear;

4. Nor is the share of profits due each limited partner stated.

Such deficient articles do not constitute substantial compliance with *Section 29-302*.

Under its recent revisions, diverse citizens may not be chosen as estate representatives so as to invoke diversity jurisdiction, as they are now deemed to have the citizenship of those whom they represent, and, additionally the *Judicial Conference* has recommended complete abolition of diversity jurisdiction.[3]

The Intervention of Magee Drilling Company:

Under that section of its brief entitled, *Relief Requested*, Respondent asks this Court to sustain the dismissal of Magee's counterclaim asserting that Respondent is guilty of violations of the *Deceptive Trade Practices-Consumer Protection Act* (hereafter "DTPA") of the state of Texas. In the event that this Court dismisses this case for lack of diversity jurisdiction, the relief requested by Respondent would not be appropriate.

In *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord,*

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[3] The 1988 amendment to *28 U. S. C. 1332* reverses the holding of *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (S. Ct. 1931), making it impossible to create diversity jurisdiction through the process of appointing an estate representative with appropriate citizenship, and obviates the problem of resolving the conflict in the jurisprudence recognized by the dissents in *Wilsey v. Eddingfield*, 475 U. S. 1130, 106 S. Ct. 1660, 90 L. Ed. 2d 202 (S. Ct. 1986).

Nor in its remarks concerning a perceived trend in the development of diversity jurisdiction, does Respondent mention the repeated recommendation of the *Judicial Conference* that diversity jurisdiction be abolished. See *Reports of the Proceedings of the Judicial Conference of the United States*, September 1987, page 72; September 1988, page 22.

et al., 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914) this Court held that:

> These rights to intervene and file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

If the District Court was without jurisdiction initially, there was no action in existence in which Plaintiff could have intervened. It follows as night does day that, absent the jurisdiction of the court in the principal action, Magee's intervention therein was without effect.

In *Harris v. Amoco Production Co.*, 768 F. 2d 669 (5th Cir. 1985) which was a suit involving an equal employment opportunity claim filed by employees of the defendant in which the Equal Employment Opportunity Commission intervened, the Court stated:

> But these participatory rights remain subject to the intervenor's threshold dependency on the original parties' claims, for it is equally well-settled that '[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already existing suit.'

An existing suit within the court's jurisdiction is therefore a prerequisite to a viable intervention. This is not present in this case.

CONCLUSION

Arkoma Associates is a purported Arizona limited partnership. Therefore, its citizenship is determined by that of each of its members, one of whom is a citizen of Louisiana. In that Petitioners, Carden and Limes, are Louisiana citizens as well, diversity jurisdiction does not exist.

The Court should dismiss all claims in this suit for lack of diversity jurisdiction.

Respectfully submitted,

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